(24,023)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1914.

No. 342.

NELLIE PORTER, PLAINTIFF IN ERROR,

vs.

OLLIE A. WILSON, CHARLES W. WILSON, OMER A. GARNER, AND W. M. JACKSON.

IN ERROR TO THE SUPREME COURT OF THE STATE OF OKLAHOMA.

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a *Return to Writ.*

In obedience to the commands of the within writ, I herewith transmit to the Supreme Court of the United States a duly certified transcript of the record and proceedings in the within entitled case, as requested by the præcipe for same filed herein, and made a part of this record.

In witness whereof, I hereunto subscribe my name, and affix the seal of the said Supreme Court of Oklahoma, in Oklahoma City, Oklahoma, this 31st day of December, 1913.

[Seal Supreme Court, State of Oklahoma.]

W. H. L. CAMPBELL,
Clerk of the Supreme Court of Oklahoma;
By JESSIE PARDOE, *Deputy.*

1 In the Supreme Court of the State of Oklahoma.

No. —.

NELLIE PORTER, etc., Plaintiff in Error,
vs.
OLLIE A. WILSON et al., Defendants in Error.

Præcipe for Record for the Supreme Court of the United States.

To the Clerk of the Supreme Court of the State of Oklahoma:

You are hereby requested by the plaintiff in error to make a transcript of the record in the above styled suit to be printed and filed in the Supreme Court of the United States to which said case is now being taken on writ of error from the decision of said Supreme Court of said state, and to include in said transcript of record the following and no other papers and matters:

1st. Petition of the plaintiff;
2nd. Answer thereto of the defendants herein;
3rd. Reply of plaintiff thereto;
4th. Amended petition of plaintiff;
5th. Answer of defendants to said amended petition;
6th. Reply of plaintiff to said answer to amended petition;
7th. Demurrer of defendants to said amended petition;
8th. Judgment of the trial court on the merits of the case;
9th. Motion of plaintiff for a new trial;
10th. Order of the trial court overruling said motion for new trial;
11th. Petition in error to the said Supreme Court of said State;
12th. All the evidence taken in said case on the trial thereof;
13th. Decision of the said Supreme Court of said State in said case;

14th. Petition for writ of error to Said Supreme Court from U. S. Supreme Court;
15th. Writ of error preparatory to said U. S. Supreme Court;
16th. Assignments of Error therein;
17th. Supersedeas Bond for such writ of error;
18th. Precipæ for Record; the items 13th, 14th, 15th, 16th and 17th above to be attached to the record as provided by law in such cases.

LEWIS C. LAWSON,
Counsel for said Plaintiff in Error.

2 We, the undersigned counsel of record for the defendants in error in the foregoing case, do hereby acknowledge the rec-ipt of the foregoing designation of parts of the record in said case necessary for the consideration of the errors assigned by said plaintiff in error by the Supreme Court of the United States to which said case is now being taken by writ of error, and hereby waive the designation of any other part or parts of the record therein, and agree that the above designation includes all of the portions of said record material or necessary for the consideration of the error assigned; and as said case is predicated on a demurrer to evidence in the case, we join in the request that all the evidence taken in the case be incorporated in said record as the same now appears in the transcript of said case.

Dated this the 18th day of December, 1913.

____ ____,
Counsel for said Defendants in Error.

STATE OF OKLAHOMA,
Okmulgee County:

Orlando Swain, being first duly sworn on oath, deposes and states that on the 19th day of December, 1913, at Okmulgee, Oklahoma, he delivered to E. H. Moore, of the firm of Moore & Noble, of Okmulgee, Oklahoma, a true and correct copy of the above and foregoing paper.

ORLANDO SWAIN.

Subscribed and sworn to before me this 19th day of December, 1913.

[Seal of Geo. C. Gibson, Notary Public, Okmulgee, Okmulgee County, Okla.]

GEO. C. GIBSON,
Notary Public.

My commission expires Feb. 20, 1916.

[Endorsed:] # 2469. Filed Dec. 19, 1913. W. H. L. Campbell, Clerk.

3 UNITED STATES OF AMERICA, *ss:*

To Ollie A. Wilson, Charles W. Wilson, Omer A. Garner, and W. M. Jackson, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date hereof, pursuant to a writ of error, filed in the Clerk's Office of the Supreme Court of the State of Oklahoma wherein, Nellie Porter, a minor, by Johnson E. Tiger as her next friend and legal guardian, is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Samuel W. Hayes, Chief Justice of the Supreme Court of the State of Oklahoma, this twenty third day of December, in the year of our Lord one thousand nine hundred and thirteen.

SAMUEL W. HAYES,
Chief Justice of the Supreme Court
of the State of Oklahoma.

On this 26 day of December, in the year of our Lord one thousand nine hundred and thirteen, personally appeared James A. Long before me, the subscriber, and makes oath that he delivered a true copy of the within citation to Ed. Moore of the firm of Moore & Noble, Lawyers in Okmulgee, Okla. on the 24th day of December 1913, and the attorneys of record for the within named Defendants in Error in the case in said citation mentioned.

JAMES A. LONG.

Sworn to and subscribed the 26 day of December A. D. 1913.

[Seal Irvan G. Dunn, Notary Public, Hughes Co., Wetumka, Okla.]

IRVAN G. DUNN,
Notary Public.

My Com. Ex. 2/10-'17.

Filed Dec. 27, 1913. W. H. L. Campbell, Clerk.

4 Filed Dec. 23, 1913. W. H. L. Campbell, Clerk.

In the Supreme Court of the State of Oklahoma.

No. —.

NELLIE PORTER, by Next Friend, etc, Plaintiff in Error,
vs.
OLLIE A. WILSON, CHARLES W. WILSON, OMER A. GARNER and W. M. JACKSON, Defendants in Error.

Petition for Writ of Error from Supreme Court of the United States to the Supreme Court of the State of Oklahoma.

Comes now the plaintiff in error by Johnson E. Tiger as her next friend and legal guardian and respectfully shows:

That heretofore, to wit, on the 24th day of January, 1911, there was tried in the District Court of Hughes County, State of Oklahoma, a case in which said plaintiff in error was the plaintiff and said defendants in error were the defendants; that a decree therein was rendered by said court against said plaintiff in error and in favor of said defendants in error, upon a demurrer to the evidence of plaintiff, presented by said defendants in error, and whereby said defendants in error were decreed the lands in controversy in said proceedings; that from said decree, said plaintiff in error took an appeal to the Supreme Court of said State, and the same coming to be heard upon said appeal, said Supreme Court rendered its decision therein and affirmed said decree; whereupon said plaintiff in error filed her petition in said Supreme Court for a rehearing therein and said court took said matters under consideration until the 21st day of October, 1913, on which day, said Supreme Court again rendered its decision therein, and again affirmed said decree of said District Court, and from which last decision of said Supreme Court, said plaintiffs in error now pray for a writ of error from the Supreme Court of the United States to have said matters reviewed and corrected by that court:

That it will appear from the petition and amended petition of said plaintiff in error filed in said District Court, as therein charged, that Ben Porter and Jennie McGilbra were married about the year 1893, according to the usages and customs of the Creek citizens of the Creek tribe of Indians; that they were both Creek citizens
5 and so enrolled; that of said marriage, said plaintiff in error was born about the year, 1895; that said Ben Porter and Jennie McGilbra afterward separated and never thereafter lived together as husband and wife; that they lived together as husband and wife about one year and an half, during which time said plaintiff was born; that both said Ben Porter and wife recognized and acknowledged this plaintiff to be their legal child; that a valid marriage among said Creek citizens consisted in simply agreeing to be and become husband and wife and thereafter live together as

husband and wife, according to such usages and customs among such citizens; that under such usages and customs, that said marriage was valid and that said plaintiff was the lawful and legitimate child of said Ben Porter and Jennie McGilbra, and the only heir at law of said Ben Porter and wife, and was the only child born of said marriage:

That after the separation of said father and mother, said Ben Porter took up with another woman named Lena Canard, but was never legally married to her; that there was never any divorce granted to either said Ben Porter or said Jennie McGilbra from the other, or disolving such bonds of matrimony between them;

That said Ben Porter and wife and this plaintiff were members of the Creek tribe of Indians and so enrolled; that out of the domain of said Creek Nation, said Ben Porter was allotted the lands in controversy in this suit as his distributives share therein, and on the 12th day of March, 1903, patents therefor were issued and delivered to said Ben Porter, and the same were duly recorded according to law, and said Ben Porter took possession of and accepted said lands as and for his allotment, under the laws governing the allotment of said domain of said Creek Nation;

That on or about the 23rd of November, 1906, said Ben Porter departed this life, intestate, and without any child or children other than said plaintiff in error, and seised and possessed of said allotment; and that upon his death, as aforesaid, said plaintiff in error as the surviving child and heir at law of said decedent, inherited said lands according to the laws of descent then in force at the time of the death of the said Ben Porter;

That said defendants in error as defendants therein filed
6 their joint answer and amended answers thereto wherein, in effect, they deny that said Ben Porter and Jennie McGilbra were ever married; that said plaintiff in error was the child or any relation of said Ben Porter; but admit that said Ben Porter was a Creek Indian and member of said Creek tribe; that said lands were so allotted to him as his alotment and that said decedent was seised of said lands at the time of his death; but defendants in error failed to deny that said Ben Porter had never been divorced from said Jennie McGilbra; and failed to deny that said Ben Porter recognized said plaintiff in error as his ligitimate child, or that "ever after the birth of said plaintiff, the said Ben Porter and Jennie McGilbra acknowledged and recognized this plaintiff as their lawful and legitimate child and offspring of said marriage," as alleged in the amended petition of said plaintiff in error, and also alleged substantially in said original petition; and failed to deny that existence or execution of the several deeds mentioned in said original petition as clouds upon the title to said laids;

That, by way of affirmative relief, said defendants in error, in their said answer and amended answers set up that Sam Porter and Lena Freeman and Nannie Broadnax were the heirs at law of said Ben Porter; that said Sam Porter was his brother and said Nannie Brodnax was his sister, and said Lena Freemen was his wife; and as such, became the heirs at law of said decedent; and that said

heirs had made deeds for said lands to said defendants in error, and, therefore, they were the true owners of said lands, and asked that the title thereto be quieted in them;

That plaintiff in error filed her reply to the answer and also to the amended answers of said defendants in error whereby she denied all the material matters set up in said answers, among which was a denial that said Lena was the wife of said decedent; that they were the heirs at law of said decedent; denied that said Sam Porter, Nannie Broadnax and Lena Freeman had made said defendants deeds for said lands; and denied that the laws of the Creek Nation set up in said amended answer were the laws of said Nation respecting marriages among the citizens of said tribe;

That, on the trial of said case, the plaintiff in error adduced all her testimony in chief, whereupon said defendants interposed a
7 demurrer to the evidence of plaintiff in error, whereupon said trial court sustained said demurrer and entered up judgment thereon, as follows:

(Omitting the Caption.)

"This cause coming on to be heard on this the 24th day of January, 1911, upon the pleadings and upon the evidence on the part of the plaintiffs, and upon the plaintiff resting her cause with the court upon the evidence offered, the defendants demur to the evidence and the court doth sustain the demurrer thereto, and the court finds that the alleged marital relation between Ben Porter and Jennie McGilbray was not established by the proof and did not exist, either by reason of custom or the laws of the Creek Nation; that the relation was illicit; that the plaintiff, Nellie Porter, was the illegitimate child of this illicit relation. It is therefore considered, adjudged and decreed by the court that the bill of the plaintiff be dismissed; that the title in and to the premises in this controversy contained, being the land alotted to Ben Porter, deceased, be forever quieted in these defendants against this plaintiff, and that the defendants have and recover of and from the plaintiff all their costs in this behalf expended for which let execution issue;"

That, upon the rendition of said judgment by said trial court, the plaintiff in error moved the court to set the same aside and grant her a new trial, on the following grounds and for the following reasons:

(Omitting the Caption.)

"First. Because the court erred in sustaining the demurrer of defendants to the evidence herein adduced and submitted to the court on the hearing of the cause, on said date, by the plaintiff in the case, in this, that upon a demurrer to the evidence admits all the facts which the evidence in the slightest degree tends to prove, and all the inferences or conclusions which be reasonably and *logisaccly* drawn from the evidence; and the court cannot weigh conflicting evidence, but will treat the evidence as withdrawn which is most favorable to the demurrer; and when there is any evidence intro-

duced at the trial of the cause reasonably tending to establish the allegations of the plaintiff's petition, it is error for the court to sustain a demurrer to such evidence and render judgment for the demurrant, etc.

Second. Because the court erred in finding that the alleged
8 marital relations between Ben Porter and Jennie McGilbra was not established by the proof and did not exist, either by reason of the custom or laws of the Creek Nation;

Third. Because the court erred in holding that the relations between Ben Porter and Jennie McGilbra were illicit, and that the plaintiff Nellie Porter, was the illigitimate child of this illicit relation;

Fourth. Because the court erred in decreeing that the bill of the plaintiff be dismissed at her cost; and that the title in and to the premises in this controversy contained, be forever quieted in said defendants against this plaintiff; and that defendants recover of plaintiff all their costs in this behalf expended etc.;

Fifth. Because said order and judgment herein rendered in favor of the defendants and against the plaintiff, is not sustained by sufficient evidence; but is contrary to the evidence herein adduced on behalf of this plaintiff and against the defendants, as shown by the record in the case;

Sixth. Because said order and judgment is contrary to the law; and especially the law governing the decisions of courts on the demurrer to the evidence adduced in the case;

Seventh. Because said order and judgment and said findings of the court as shown in said order herein, are not sustained by sufficient evidence but are contrary to both the law and the evidence adduced in the case;

Eighth. Because the court erred in overruling the objections of the plaintiff to the findings of fact set forth in said order and judgment, by said court;

Ninth. Because of the errors of law occurring at the trial and excepted to by the plaintiff, as shown upon the face of the record in the case:"

That said trial court overruled said motion for a new trial, to which action of the court, the plaintiff in error excepted, and then appealed said case to the Supreme Court of said state which is the court of last resort of said state in such matters; that the
9 assignments of error in her petition in error to said Supreme Court, embrace each and every ground presented in said motion for a new trial, and the second assignment thereof refers to said motion and makes the same a part thereof in toto; and the sixth assignment thereof is as follows;

"Because the court erred in predicating and basing said decree and judgment alone upon the custom and laws" of the Creek Nation;" whereas the evidence herein adduced fully and completely established a good and valid Common Law marriage between Ben Porter and Jennie McGilbra as of the time of said marriage, and thereby legitamized not only the marriage, but likewise the paternity and status of the plaintiff in error, and thus legally made her the

sole and only heir at law of her said father, the said Ben Porter, and entitled to the lands in controversy.

That on the final hearing and decision of said case by said Supreme court of said state that court held:

"In the trial of a law action all of the issues, both of fact and law, were submitted *submitted* to the court without the intervention of a jury. At the conclusion of plaintiff's testimony, and after she had rested her case, defendants demurred to the evidence, and at the same time requested the court to render judgment in their favor as prayed for in their answer, in which affirmative relief was asked. The court sustained the demurrer, and made special findings of fact, and rendered a decree in favor of the defendants. Held that, while the judgment of the court sustained the demurrer, yet, having made special findings of fact, it was obvious that the court weighed the plaintiff's testimony for the purpose of determining the rights of the respective parties, and, the whole case being before the court, and there being evidence reasonably tending to support the court's findings, no reversible error was committed.

Point 2.

When a trial is had before the court without a jury, the court must eventually weigh the testimony for the purpose of determining where the preponderance is, and there is no reason why it should not do so at the earliest possible time, when the rights of the plaintiff will not be cut off or impaired by its so doing, and, when the plaintiff has introduced all her proof, and rested, no right of hers will be impaired, if the court then determines what has been proven.

Point 3.

10 This court is required by statute to disregard any error or defect in the pleadings or proceedings which does not affect the substantial rights of the adverse party.

Point 4.

Section 5 of the act of Congress of February 28, 1891, (26 Stat. at L. 794, c. 383), which provides: "That for the purpose of determining the descent of land to the heirs of any deceased Indian, under the provisions of said act (Act Feb. 8, 1887, 24 Stat. at L. 388, c. 119), — have cohabited together as husband and wife, according to the custom and manner of Indian life, the issue of such cohabitation shall be, for the purpose aforesaid, taken and deemed to be the legitimate issue of the Indians so living together, and every Indian child, otherwise illegitimate, shall for such purposes be taken and deemed to be the ligitimate issue of the father of such child"—was not extended in its operations to the territory occupied by the Creek Indians in the Indian Territory;" and which decision is now reported in 135 Pacific Reporter, page 732, and to which reference is here made.

From the foregoing statement, facts, decisions and the record in this case, it is evident that the following Acts of Congress and Fed-

eral features are involved in the proper decision and consideration of this case, namely:

First. The plaintiff in error and her said father and mother were Creek Indians and members of the Creek tribe or Nation, and were so enrolled; and being a full blood Creek, the *pinitiff* in error is now a ward of the Federal Government and under its control and protection, not only under Art. 1, Section 8, clause 3 of the Constitution of the United States; but likewise under the various Acts of Congress hereafter mentioned.

Second. The lands in controversy in this suit is the allotment of Ben Porter, a Creek citizen and member of the Creek tribe of Indians, and were derived to him by the express provisions of an Act of Congress, entitled, "An Act to ratify and confirm an agreement with the Muskogee or Creek tribe of Indians, and for other purposes," passed on the 1st day of March, 1901; or another Act of Congress, entitled, "An Act to ratify and confirm a supplemental agreement with the Creek tribe of Indians, and for other
11 purposes," approved on the 30th day of June, 1902, under one of which acts the patents therefor were issued to said Ben Porter in his lifetime, as shown in plaintiff in errors's petition and admitted by defendants in error in their said answers.

Third. That upon the death of said Ben Porter in November, 1906, said lands descended to his legal heirs, according to section 6 of said last named act, and another act of Congress, passed on the 28th of April, 1904, whereby all statutes of Arkansas formerly in force in Indian Territory were continued in force and made applicable to all persons and estates within said Territory whether Indian, freedmen or otherwise, among which said statutes was chapter 49 of Arkansas, specifically put in force in the Creek Nation under said section 6 of said act. Under said act and said chapter 49, the child or children of a deceased father, a member of said Creek Nation, are made his legal heirs at law and inherit his estate; and under which chapter a child born a bastard become- the legal heir if afterward ligitamized.

Fourth. That from ancient times, the Federal Government has ever recognized and treated with the Creek tribe of Indians as a distinct body or independent society of people, and empowered with the right and power to regulate their domestic affairs and fix their marital and social relations with each other; and their laws, usages and customs have ever been held valid, until abolished by the Act of Congress, passed on the 28th of June, 1898, known as the Curtis Act. Such rights usages and customs are recognized and provided for by Congress in the Treaty with the Creek tribe, proclaimed on the 11th day of August, 1866, and especially article 10 thereof where interference with these tribal relations, laws, rights, privileges and customs are forbidden to Congress to interfere with; and in the act of Congress of May the 2nd, 1890, in section 38 thereof, such rights are again recognized and provided for by Congress, and whereby their marital relations etc. are preserved, and the statu-e of Arkansas relative to marriages are to have no application to the Indians etc.

Fifth. The Creek citizens and Nation had their laws, usages
12 and customs which were partly written and published, among which are to be found McKellop's "Constitution and Laws of the Muskogee Nation" of 1893, from which defendants in error specially set up section 310, on page 108 thereof, which is as follows:

"Marriages may be solemnized by any of the Judges of the Courts of this Nation, or by any ordained minister of the Gospel in regular communion with any religious society; and any marriage, contracted in writing, or in the presence of two or more witnesses who shall sign the marriage contract as such, shall be lawful"; and the evidence taken in this case and uncontradicted, shows that the method above prescribed by said laws was not the only way a Creek marriage could be consummated even from 1890 to 1898; but that such marriage could be perfected by this Creek custom by simply going together and living together as husband and wife and that the offspring of such marriages were deemed legitimate and inherited the property of their parents. It will be observed that said provision above quoted does not provide that a marriage cannot be consummated in any other manner. Consequently, as such marriages and the right to govern their domestic affairs were recognized by Congress, as above indicated, such matters come within the protection of Congress and the Ferderal courts, and where such rights, titles arising therefrom under any act of Congress, are denied to such Creek citizens, they are protected by Federal Acts.

Sixth. Section 258 of said McKellop's Constitution and Laws of the Muskogee Nation, provides:

"If any person claim to be the child of a deceased male person, and it should be proven that such person did not, during life, recognize the claimant as his offspring, then such claimant shall not be entitled to any share in the estate of the deceased." This provision was in force in said Creek Nation at the time Ben Porter and Jennie McGilbra were so living together, and at the time Nellie Porter was born and long after she had become recognized by Ben Porter had recognized her as his "offspring." This law being in existence at that time and Congress having put the Creek laws of descent and distribution in force in said Creek Nation under said Act of March 1st, 1901, it was not necessary to specifically set out said provision in the pleading in this case; but the
13 plaintiff in error did specifically set up her claim under this provision of said Creek laws to said lands by alleging in both her original petition and amended petition that said Ben Porter always recognized and acknowledged her as his child and offspring, as may be seen from said pleadings. Said defendants never denied these allegations and they stand there proven in the record both by such admission and by the testimony taken in the case. But both the trial court and said Supreme Court ignored this provision and never referred to it; but the legal result of the decision in this case is to deny the plaintiff in error the benefit of this Creek law; and the same having thus been set up and claimed but

thus found against by said court, the same presents a federal question under the laws of Congress herein referred to and under section 709 of the Revised Statutes and section 237 of The Judicial Code, and subject to review by the Supreme Court of the United States, as in said sections and acts provided.

Seventh. That by the sixth assignment above quoted, the plaintiff in error presented to said Supreme Court the claim that the relations between Ben Porter and Jennie McGilbra and the agreement between them to become husband and wife, was sufficient within itself to constitute a good and valid common law marriage. By said act of Congress of May 2, 1890, the Constitution of the United States was spread over Indian Territory, and chapter 20 of the Statutes of Arkansas was extended over and put in force in said Territory. This chapter relates to the common law of England. Therefore, when Ben Porter and Jennie McGilbra were married about 1893, this common law was in force in Indian Territory; and the facts relating to this marriage would constitute a good and valid marriage at common law. But while this assignment conclusively shows that the plaintiff in error specially set up this federal feature in support of her right and title to said lands the same was also ignored by said courts and thereby necessarily found the same against her and her rights and title thereto. The extension of said chapter 20 of Arkansas over Indian Territory, was an act of Congress; and this decision in this case is against the application thereof to the rights of the plaintiff in error and therefore denies her the protection of said act.

14 Eighth. The plaintiff in error also set up and specially claimed the benefit of said acts of Congress mentioned in the 4th point in the syllabus of said case, and in addition thereto the act of Congress of March 3rd, 1901, amending section 6 of said act of Fed. 8th, 1887, by inserting therein the words: "And every Indian in Indian Territory," after the words "civilized life"; but said court construed said acts and provisions against the rights and interest of the plaintiff in error as shown in said opinion of said Supreme Court, and thereby denied her their protection; that by said acts and said section 258 of said Creek laws of descent, aforesaid, said plaintiff in error set up and claimed in this case that it thereby became wholly immaterial for the purposes of this suit whether she was legitimate or illegitimate child of said Ben Porter, she thereby became his sole and only heir at law and, on his death in November, 1906, inherited said lands and her right and title thereto was so derived from said acts of Congress; but said decision was against her and said acts.

Ninth. That, on the trial of said cause before said district court, after the plaintiff in error had introduced her testimony in chief, the defendants in error interposed their demurrer to such testimony and the same was sustained by said court to which plaintiff in error excepted, as shown at the end of the testimony taken in the case, whereupon said court rendered judgment in said case on both the law and the facts, as shown on the face of said decree. Plaintiff in error objected to said court finding the facts and ren-

dering said judgment, as is evidenced in the record from said motion for a new trial therein; but said motion was overruled by said court to which action the plaintiff in error excepted, and again presented all the grounds of said motion to said Supreme Court, in her assignments of error, and especially the second assignment in which all the grounds of said motion are made part thereof as if again set forth in haec verba. Here it is set forth that said judgment and decree is not only not sustained by sufficient evidence, but that the same is contrary to both the law and the evidence governing said case, and especially the law governing a demurrer to evidence, as especially shown by said motion and assignments of error. After the plaintiff in error had objected and excepted to all such matters, and then carried her wrongs before said Supreme Court for redress, she had presented them with all the diligence and force of which the occasion permitted. As is shown on the face of said decree, said trial court acted simply on said demurred to the evidence which presented only a proposition of law, but not of fact; but, over the objections of the plaintiff in error, as shown by the eighth ground for a new trial, said trial court proceeded to find the facts in the case on said demurrer to the evidence, and found them against her and dismissed her cause of action, and said actions of the trial court were affirmed by said Supreme court, as shown by said opinion rendered therein. We respectfully submit that a demurrer to evidence presents a proposition of law, and not of fact, and that such matters are governed by the general law and jurisprudence of the land, and is cognizable in all courts alike and governs such matters in whatever court a demurrer to evidence may be presented; that on said demurrer to the evidence, it was not in the power or within the legal jurisdiction of said trial court to convert the proposition of law thereby presented, into a trial of the whole facts in the case as it then stood, and find the facts in the case against the plaintiff in error, and dismiss her action, over her objections and exceptions to such actions of the court; that such actions of the court is not warranted by the law governing such matters, and is not due process of law; but is repugnant to and in violation of not only section 7 of article 2 of the Constitution of the State of Oklahoma, which provides, "No person shall be deprived of life, liberty or property, without due process of law"; but the same is likewise repugnant to, and in violation of, the 14th Amendment to the Constitution of the United States wherein it is therein provided:

"No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws"; that section 5039 of the Revised Laws of Oklahoma, is as follows:

"The provisions of this article respecting trials by jury apply, as far as they are in their nature applicable, to trials by the court"; but in the trial of the case at bar, an entirely different rule and

application of the law is applied than was applicable in a
16 case tried to a jury under said statute of said state; and we respectfully submit that the trial of this case and the said decree therein rendered is not due process of law, as guaranteed by said provisions of said respective Constitutions, and denies this plaintiff in error the equal protection of the laws, in violation of said 14th Amendment of the Constitution of the United States.

Wherefore, your petitioner presents herewith an exemplified transcript of the record of the Supreme Court of the state of Oklahoma in said case and prays that a writ of error to said Supreme Court of the United States be allowed; that citation be granted and signed; that the bond herewith presented be approved, and upon the compliance with the terms of the statute in such cases made and provided said bond and writ of error be operative as a supersedeas; that the errors complained of be reviewed in the Supreme Court of the United States and the judgment of the Supreme Court of Oklahoma be reversed.

NELLIE PORTER, *Petitioner.*
By LEWIS C. LAWSON,
Her Attorney.

17 Filed Dec. 23, 1913. W. H. L. Campbell, Clerk.

In the Supreme Court of the State of Oklahoma.

No. —.

NELLIE PORTER, by JOHNSON E. TIGER, as Her Next Friend and Legal Guardian, Plaintiff in Error,

vs.

OLLIE A. WILSON, CHARLES W. WILSON, OMER A. GARNER, and W. M. JACKSON, Defendants in Error.

Comes now the said plaintiff in error and respectfully submits that in the record, proceedings, decisions, and final judgment of the Supreme Court of the State of Oklahoma, in the above entitled matter there is manifest error in this, to wit:

First. That the said supreme court erred in holding that section 5 of the act of Congress of February 28, 1891, (26 Stat. at L. 794, c. 383), which provides: "That for the purpose of determining the descent of land to the heirs of any deceased Indian, under the provision of said act (Act. Feb. 8, 1887, 24 Stat. at L. 388, c. 119), whenever any male and female Indian shall have cohabitated together as husband and wife, according to the custom and manner of Indian life, the issue of such cohabitation shall be, for all the purposes aforesaid, taken and deemed to be legitimate issue, of the Indians so living together, and every Indian child, otherwise illegitimate, shall for such purposes be taken and held to be the legitimate issue of the father of such child",—was not extended in its operations

to the territory occupied by the Creek Indians in the Indian Territory.

Second. That the court erred in holding that, on the demurrer to the evidence interposed by the said defendants in error the court could, and did, weigh the conflicting evidence in the case, and find the facts in the case and determine the rights of the parties hereto in said case, and there being evidence reasonably tending to support the court's finfings, no reversible error was committed; that said demurrer to the evidence adduced in the case by the plaintiff in error presented to said court a proposition of law, and not of fact; and that it was not in the power of said court or the trial court herein to convert or transform said proposition of law thereby pre-
18 sented on said demurrer to said evidence, into a matter of fact or to find the facts in said case thereon and render final judgment in said case against the plaintiff in error and in favor of said defendants in error, and thereby deprive and deny the plaintiff in error of her right, title and interest in and to said lands and quiet the title thereto in said defendants in error; that the action of said court in so rendering said judgment in said case and finding the facts therein against the plaintiff in error and in favor of said defendants in error, on said demurrer to the evidence of the plaintiff in error, is repugnant to, and in violation of the seventh section of article two of the Constitution of said state of Oklahoma, wherein it is provided that no person shall be deprived of life, liberty or property without due process of law; and the same is likewise repugnant to, and in violation of the 14th Amendment to the Constitution of the United States wherein it is provided: No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property, without due process of law, nor deny any person within its jurisdiction the equal protection of the laws"; that section 5039 of the Revised Laws of the state of Oklahoma, provides: "The provisions of this article respecting trials by jury apply, as far as they are in their nature applicable, to trials by the court"; that under said section 5039 the citizens of said state and United States are entitled to the same protection and enforcement of the law, on a demurrer to the evidence where their causes of action are tried to the court, as when tried to a jury; and on trial to a jury, conflicting evidence cannot *not* be weighed or considered by the court, and if there be any evidence tending to support the cause of the demurree, the said demurrer should be overruled; but in the case at bar, said court, on said demurrer, proceeded to weigh the evidence, find the facts and render final judgment on both the law and the facts in the case as the same stood on said demurrer, and found the law and facts against the plaintiff in error and thereby deprived her of her right and title to the lands in controversy; and plaintiff in error submits that such action of said court is, therefore not due process of law, as guaranteed to her under said provisions of said Constitutions; and that by such actions of the court, she is not given the equal protection of the laws, as in said 14th Amendment is provided.

19 Third. That said court erred in finding and holding that "the alleged marital relation between Ben Porter and Jennie

McGilbray was not established by the proof and did not exist, either by reason of custom or the laws of the Creek Nation; that the relation was illicit; and tha- the plaintiff, Nellie Porter, was the illegitimate child of this illicit relation", for, on a demurrer to the evidence it was not in the power of said court to so find such facts, and the finding of the same was in violation of said respective provisions of said respective Constitutions, and are therefore void and inoperative as such findings of facts in the case, and said judgment based thereon is likewise repugnant to said provisions of said Constitutions, and deprives the plaintiff in error of her property in said lands, contrary to said provisions and without due process of law as thereby guaranteed by said Constitutions, as aforesaid; that said judgment is not warranted by the general law of the land relative to demurrers to evidence but is in direct violation of the same, and therefore, without the sanction of law, justice or right; that on a proper application of the law which governed said demurrer to the evidence so adduced on said trial to the evidence in said case, the judgment of said court would have been in favor of the plaintiff in error on a proposition of law alone which was the only matters which could be legally determined on such demurrer; that on a proper application of the law which governs a demurrer to evidence, the evidence adduced by the plaintiff in error amply showed a valid marriage between said Ben Porter and Jennie McGilbra both according to the usages, customs and laws of said Creek Nation, and by the common law, which was in force in Indian Territory at the time of said marriage; that the common law was extended over said Territory by act of Congress of May 2, 1890, in section 38 of which the Creek customs, marriages and domestic affairs were guarded and protected; and said judgment is against both said customs and tribal marriages and common law marriages, thus sanctioned by Congress and in force when such marriage was consummated, and deprives the plaintiff in error of such laws by so holding against the same in said judgment;

20 Fourth. That said court erred in holding that the plaintiff in error, even if she had been illegitimate, was not entitle- to said lands; for it is found in said judgment that "the plaintiff, Nellie Porter, was the illegitimate child of this illicit relation". If so, under the said Acts of Congress mentioned in the first assignment, the plaintiff in error would have been the sole and only heir to the lands in controversy, for it is so found that she is the "illegitimate child of this illicit relation", and, therefore the child of Ben Poreter.

Again, section 258 of McKellop's "Constitution and Laws of the Muskogee Nation", provides: "If any person claim to be the child of a deceased male person, and it should be proven that such person did not, during life, recognize the claimant as his offspring, then such claimant shall not be entitled to any share in the estate of the deceased"; this was a part of the laws of descent of said Creek Nation and was in force at the time of this marriage and the birth of the plaintiff in error, and this feature is set out in both the original and amended petitions of the plaintiff in error, and therefore brought directly to the notice and attention of the court, and is still before the courts. This allegation was nowhere denied by the answers of

the defendants in error, and now stands there uncontradicted. Besides, the proof on this point, namely, that Ben Porter recognized the plaintiff in error as his offspring was abundantly proven by the testimony in the case. The judgment, therefore, is in direct violation of this law and the evidence on the matter, and denies the plaintiff in error her right and title to said lands which, under said laws she would otherwise have been entitled to had said court recognized and enforced said laws in this assignment mentioned.

Fifth. That said Ben Porter and the plaintiff in error are full blood Creek citizens and were so enrolled; that the lands in controversy was the allotment of said Ben Porter under an act of Congress entitled, "An act to ratify and confirm an agreement with the Muskogee or Creek tribe of Indians, and for other purposes" or another act of Congress entitled, "An act to ratify and confirm a supplemental agreement with the Creek tribe of Indians, and
21 for other purposes"; that when said Ben Porter died in November, 1906, said lands descended to his heirs under said last named act, and especially section 6 thereof; that under said acts of Congress herein mantioned, and the laws and customs and usages of said Creek Nation, the plaintiff in error was, and still is, the rightful and legal heir of said Ben Porter and entitled to said lands thereunder; that said judgment of said court was against said acts of Congress and said laws, usages and customs of said Creek Nation, and thereby denied to the plaintiff in error her right, title and interest in and to the lands in controversy in this suit, contrary to the terms and provisions of said laws aforesaid.

Wherefore this plaintiff in error prays that the judgment and decision aforesaid may be reversed, annulled, and altogether held for naught, and that she may be restored to all things which she has lost by reason of the action and because of the said judgment and decision.

NELLIE PORTER, *Petitioner,*
By LEWIS C. LAWSON,
Attorney and Counsel for Plaintiff in Error.

22 (Filed Dec. 23, 1913. W. H. L. Campbell, Clerk.)

In the Supreme Court of the State of Oklahoma.

NELLIE PORTER, etc., Plaintiff in Error,
vs.
OLLIE A. WILSON, CHARLES W. WILSON, OMER A. GARNER, and W. M. JACKSON, Defendants in Error.

On her presentation of her petition herein for a writ of error from the Supreme Court of the United States to the Supreme Court of the state of Oklahoma, the said plaintiff in error has been this day allowed such writ and citation to said defendants in error — has this day been issued, on motion of said plaintiff in error, James A. Long of Wetumka, Oklahoma, is hereby appointed and empowered to serve said citation upon said defendants in error; and he is di-

rected to make his return of such service according to law in such cases.

Done on this the twenty third day of December, 1913.

[SEAL.] SAMUEL W. HAYES,
Chief Justice of the Supreme Court of the State of Oklahoma.

Attest:

W. H. L. CAMPBELL, *Clerk,*
By JESSIE PARDOE, *Deputy.*

23 (Filed Dec. 23, 1913. W. H. L. Campbell, Clerk.)

In the Supreme Court of the State of Oklahoma.

No. —.

NELLIE PORTER, Plaintiff in Error,
vs.
OLLIE A. WILSON, CHARLES W. WILSON, OMER A. GARNER, and W. M. JACKSON, Defendants in Error.

The above entitled matter coming on to be heard on this the twenty third day of December, 1913, upon the petition of said plaintiff in error therein for a writ of error from the Supreme Court of the United States to the Supreme Court of the State of Oklahoma, in said matters, and upon the examination of said petition and the record in said matters, and desiring to give the petitioner an opportunity to present to the Supreme Court of the United States the questions presented in the record in said matter—

It is ordered that a writ of error be, and is hereby, allowed, to this court from the Supreme Court of the United States, and that said plaintiff in error desiring a supersedeas herein and having presented her petition for such writ within the sixty days from the rendition of the judgment of this court herein on the 21st day of October, 1913, the amount of such bond is hereby fixed at the sum of fifteen hundred dollars; and said plaintiff in error being a minor, said bond is given by Johnson E. Tiger as the next friend and guardian of said minor, as principal.

This 23rd Dec. 1913.

[SEAL.] SAMUEL W. HAYES,
Chief Justice of the Supreme Court of the State of Oklahoma.

Attest:

W. H. L. CAMPBELL, *Clerk,*
By JESSIE PARDOE, *Deputy.*

24 Filed Dec. 23, 1913. W. H. L. Campbell, Clerk.

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorable the Judges of the Supreme Court of the State of Oklahoma, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Supreme Court of the State of Oklahoma before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between Nellie Porter as plaintiff in error, and Ollie A. Wilson, Charles W. Wilson, Omer A. Garner and W. M. Jackson, as defendants in error; the said Nellie Porter, being a minor, having brought said proceedings by Johnson E. Tiger as her next friend and legal guardian, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity; or wherein was drawn in question the construction of a clause

25 of the Constitution, or of a treaty, or statute of, or commission held under the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission; a manifest error hath happened to the great damage of the said plaintiff in error, Nellie Porter, as by her complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within thirty days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the twenty third day of December, in the year of our Lord one thousand nine hundred and thirteen.

[Seal of the United States District Court, Western District of Oklahoma.]

ARNOLD C. DOLDE,
Clerk of the District Court of the United States, Western District of Oklahoma.

Allowed by
SAMUEL W. HAYES,
Chief Justice of the Supreme Court of the State of Oklahoma.

26 Know all men by these presents, That we, Johnson E. Tiger as the Guardian and next friend of Nellie Porter, a minor, under eighteen years of age, as principal, and C. C. Stanford and A. J. Edmondson, as sureties, are held and firmly bound unto Ollie A. Wilson, Charles W. Wilson, Omer A. Garner and W. M. Jackson in the full and just sum of Fifteen Hundred ($1500.00) dollars, to be paid to the said Ollie A. Wilson, Charles W. Wilson, Omer A. Garner and W. M. Jackson certain attorney-, executors, administrators, or assigns: to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents. Sealed with our seals and dated this twenty-third day of December, in the year of our Lord one thousand nine hundred and thirteen.

Whereas, lately at a recent term of the Supreme Court of the State of Oklahoma in a suit depending in said Court, between said Nellie Porter, a Minor by said Johnson E. Tiger, as her next friend and guardian, as plaintiff, and said Ollie A. Wilson, Charles W. Wilson, Omer A. Garner and W. M. Jackson, as defendants therein a judgment or decree therein was rendered against the said Nellie Porter and in favor of said defendants by said Supreme Court and the said Nellie Porter having obtained writ of error and filed a copy thereof in the Clerk's Office of the said Court to reverse the said decree in the aforesaid suit, and a citation directed to the said Ollie A. Wilson, Charles W. Wilson, Omer A. Garner and W. M. Jackson citing and admonishing them to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date thereof.

Now, the condition of the above obligation is such, that if the said Nellie Porter shall prosecute said writ of error to effect, and answer all damages and costs if she fail to make her plea good, then the above obligation to be void; else to remain in full force and virtue.

Sealed and delivered in presence of

JOHNSON E. TIGER. [SEAL.]
C. C. STANFORD. [SEAL.]
A. J. EDMONDSON. [SEAL.]

Approved by
SAMUEL W. HAYES,
Chief Justice of the Supreme Court of the State of Oklahoma.

Endorsed: #2469. Filed Dec. 26, 1913. W. H. L. Campbell, Clerk.

27 STATE OF OKLAHOMA,
Hughes County:

The undersigned, sureties on the foregoing Bond, being duly sworn, on oath each for himself says: I am a resident householder and freeholder within the State of Oklahoma, and have property within said State worth over and above all my just debts and liabilities exclusive of property exempt from execution, the sum set

out and stated below, that is to say:

I, C. C. Stanford, am worth the sum of $1500.00.

I, A. J. Edmondson, am worth the sum of $1500.00.

C. C. STANFORD.
A. J. EDMONDSON.

Subscribed and sworn to before me this 23rd day of December, 1913.

[SEAL.] RALPH P. WELCH,
Notary Public.

My Com. Expires Nov. 21, 1916.

I hereby approve the above bond this — day of ——, 19—.

——— ———,
County Judge.

28 "In the District Court of Hughes County, State of Oklahoma.

NELLIE PORTER, by Next Friend, etc., Plaintiff,
vs.
OLLIE A. WILSON, CHARLES W. WILSON, OMER A. GARNER, W. M. JACKSON, and R. H. FITZGERALD, Defendants.

Petition.

Comes now the Plaintiff, Nellie Porter by Johnson E. Tiger, as her next friend and legal guardian herein, and for cause of action herein against the above named defendants, charges and avers:

First. That Ben Porter, the father of said Nellie Porter, was, in his lifetime, a Creek Citizen and member of the Creek Nation, and so enrolled; that the roll number of said Ben Porter was 5583; that during his lifetime said Porter received his full allotment out of the general domain of said Creek Nation, in the way and manner provided by law; that on the 12th day of March, 1903, a patent was issued to the said Porter for the South West Quarter of Section Ten (10), Townshop Thirteen (13) North, Range Thirteen (13) East, containing 40 acres, and therein designated his homestead; that on the 25th day of April, 1903, said patent was approved by the Department of the Interior of the United States, and the same was admitted to record in the proper office therefor in Book "K" of Homesteads, on page 31; that on the 12th day of March, 1903, another patent was issued to said Porter as his surplus thereof for the South East Quarter of the North East Quarter of Section Ten (10), Township Thirteen (13) North, Range Thirteen (13) East; and the South Half of the South Half of the South East Quarter of Section Twenty eight (28), and the South East Quarter of the North West Quarter
29 of Section Thirty Three (33), Township Nine (9) North, Range Thirteen (13) East, containing 120 acres; that the same was approved by said Department on the 25th day of April, 1903, and recorded in said office on the 9th day of May, 1903, in Vol. 11, page 31; and that said Homestead and the 40 acres adjacent

thereto, are situated in the County of Okmulgee, State of Oklahoma, and the remaining 80 acres thereof are situated in the County of Hughes, in said State, and said Porter lived and resided in said County of Hughes, at the time of his death hereinafter mentioned.

Second. That said Ben Porter and Jennis McGilbra were married to each other about the year One Thousand Eight Hundred and Ninety Three (1893) and thereafter lived and resided together as man and wife about one and one half years; that of said marriage the plaintiff, Nellie Porter, was born and was always recognized by said Porter thereafter as his legitimate child; that after so living together as man and wife for the time aforesaid, said Porter and wife separated, and thereafter said Porter lived apart from his said wife Jennie until the time of his death; that neither said Porter or his said wife, Jennie, ever obtained a divorce from the bonds of matrimony, nor was a divorce ever granted to either of them decreeing a separation of any kind, from the other; but they remained ever after said separation as man and wife the same as before such separation, until the time of his death; that said Porter and wife never had any other children born to them of said wedlock, nor had said Porter any child or children other than said Nellie at the time of his death; that said Ben Porter departed this life, intestate and without a will, on or about the 23rd day of November, 1906, and that at the time of his death aforesaid, said Porter was the owner in fee simple of all of the lands above described, and died seized and possessed of the same; and the said Nellie Porter, the plaintiff in this suit, was, and still is, the sole and only heir at law of the said Ben Porter, and upon his death aforesaid became entitled in fee simple to all of said lands and all his estate of every kind, character and description whatsoever.

Third. The said Nellie Porter is an infant about sixteen years of age, and is a Citizen of said Nation and member thereof and so enrolled, and has received her allotment as such in said Nation, and now lives and resides in said County of Hughes; and that said Johnson E. Tiger was, about the month of August, 1909, duly appointed the legal guardian of the person and estate of said minor, by the County Court of Said County of Hughes, gave bond as such guardian and took upon himself the discharge of the duties of said office, and is still acting in said capacity and official position.

Fourth. That after the said separation of said Porter and his wife Jennie, said Porter took up with another woman by the name of Lena Canard, and as plaintiff is informed and believes, was living with said Lena Canard at the time of his death aforesaid; that after his death, said Lena was married to William Freeman; that said Porter and Lena were never legally and lawfully married to each other; and that said Jennie Porter, the said wife of said Porter, is still living and was never divorced from said Ben Porter, as aforesaid.

Fifth. That at the time of his death, said Ben Porter left him surviving one Sam Porter, an half brother who is a Semonloe Indian and so enrolled, and Nanny Broadnax, an half sister; that after said

death, said Sam Porter and Nanny Broadnax, set up a claim
31 to the estate of said Ben Porter, as his legal heirs, and on the 14th day of September, 1907, said Sam Porter made a deed to said Charles W. Wilson for all his right, title and interest in said South Half of said North East Quarter of said Section Ten, Township Thirteen North, Range Thirteen East, and the same was recorded on the 18th of said month and on the 18th of said month, said Sam Porter made said Wilson another deed in the name of C. W. Wilson, for the said South Half of the South Half of the said North East Quarter of said Section 28, and said South East Quarter of the North West Quarter of said Section 33, Township 9 North, Range 13 East, and the same was placed of record on the 19th of said month; that on the 29th day of February, 1908, said Nanny Broadnax made said Wilson a deed for all of said lands thus allotted to said Ben Porter, and the same was admitted to record in the Register of Deeds of Okmulgee County, on the same day, and recorded in Book D-6-A page 65, and so admitted in Hughes County on the 2nd of March 1908, and recorded in Vol. A page 285-8; that on the 9th of March, 1908, said Lena Freeman and W. M. Freeman made said Wilson a deed for said South Half of the North East Quarter of said Section Ten, Township 13, North, Range 13 East, and the same was recorded in said Book D-6-A page 99, and another deed for said South Half of the South Half of the South East Quarter of said Section 28, and said So-th East Quarter of said North West Quarter of said Section 33, Township 9 North, Range 13 East, and the same was recorded in said Hughes County in Book "A" page 300; that on the 1st day of September, 1908, said Wilson and said Ollie A. Wilson, his wife, made to said Omer A. Rarner a quit-claim deed for all of said lands of said decedent, and the same was recorded in said respective Register of Deeds, in Book D-18-A page 344, and Book B page 47; that on the 23rd of November, 1908, said Garner and his wife made to said Ollie A. Wilson a quit-claim for all their interest in said lands, and the same was admitted in said re-
32 spective offices in said D-18-A page 345, and Book B page 48; that on the 12th day of December, 1908, said Ollie A. Wilson and husband made a quit-claim back to said Garner for an undivided one third interest in all said lands, and the same was admitted to record in said respective offices on the Book M-29-A page 415 in Okmulgee, County, and in Vol. B page 47 in Hughes County; that on the 12th day of December, 1908, said Ollie A. Wilson and husband made to said W. M. Jackson a quit-claim deed for an undivided one third interest in all of said lands, and the same was recorded in Okmulgee County, in Book m-29-A page 377, and in Hughes County, in Book "F" page 311; and that on the 9th day of April, 1910, said Ollie A. Wilson, W. M. Jackson and Omer A. Garner, by the initials O. A. Garner, made and executed to R. H. Fitzgerald an oil and gas lease upon said South East Quarter of said North West Quarter of said Section 33, Township 9 North, Range 13 East, and the same was admitted to record in the said office of the Register of Deeds for said Hughes County, in Miscellaneous Book No. 3 on page 127; that the duration of said lease is

left blank on the face thereof, but there are provisions in said lease for operating upon said lands for oil and gas under said lease for years to come in case oil and gas in paying quantities are found upon said lands thereunder.

Sixth. That on the 1st day of August, 1908, said Ollie A. Wilson took another deed for all of the lands of said decedent, and the same was filed of record in said Hughes County, on the 8th of December, 1908, in Book B on page- 49 and 50, and in said Okmulgee County, on the 10th day of March, 1910, in Book D 37 A page 594; that the same was so taken from the said Lena Freeman and William Freeman, and on the 4th day of the same mo-th, to-wit: August, 1908, said Ollie A. Wilson also took another deed from said Sam Porter for all of said lands of said decedent, and the same was
33 recorded in said Hughes County on the 8th day of December, 1908, in Book B on page 49, and in Okmulgee County on 15th of March, 1910, in Book D 37 A page 595; that on the 23rd day of November, 1908, said Ollie A. Wilson took another deed from said Nanny Broadnax and husband James Broadnax for all of said lands, and the same was admitted to record in said Hughes County, on the 8th day of December, 1908, in Book B on page- 48 and 49, and in Okmulgee County on the 15th of March, 1910, in Book D 37 A page 596; and that on the 8th day of December, 1908, said Ollie A. Wilson attempted to have said deeds thus obtained from Sam Porter, Lena Freeman and husband and Nanny Broadnax approved by the County Court of said Hughes County and said Court proceeded to approve the same on said date and made orders therein approving the same, the said Nanny Broadnax and Lena Freeman being full-blood Creek Citizens and members of said Nation and so enrolled; and that said Ben Porter on the 26th of October, 1906, leased said allotment or at lease a portion thereof to one W. Thornburgh for a period of five years from the 1st day of January, 1907, and the lease thereof was recorded on the 1st day of November, 1906, and said lease has not yet expired, as now appears of record in the office of said Register of Deeds of said Hughes County, in Miscellaneous record Vol. 12 page 439.

Seventh. That said Lena Freeman, Sam Porter and Nanny Broadnax never had any right, title or interest or estate in or to said lands of said decedent, and their respective deeds hereinbefore mentioned were, and still are, null and void; that the same and each of them passed no right, title or interest in or to said lands to said respecitve grantees mentioned therein; that said deeds of said Wilson and wife to said Garner, Jackson and from said Garner to said Ollie A. Wilson, as aforesaid, and said oil and gas lease
34 from said Wilson, Jackson and Garner to said Fitzgerald, and each of them, are null and void, but constitute clouds upon the title to said lands and greatly depreciate the market value thereof and are a great and inestimable injury thereto.

Therefore plaintiff prays that said Wilson, Garner, Jackson and Fitzgerald be made parties defendants hereto, and required to answer this petition on oath; that due process herein do issue; that this plaintiff be decreed herein to be the owner of said lands and

entitled thereto in fee simple; and that all said deeds and lease aforsaid be decreed null and void, and be removed as clouds upon the title to said lands in the hands of this plaintiff; that plaintiff have her cost herein expended; and that all such other, further and general relief herein be granted as the nature of the case may require or to which plaintiff may be entitled in a court of equity and good conscience, and he will ever pray, etc.

LEWIS C. LAWSON,
Counsel for Plaintiff.
NELLIE PORTER,
By Next Friend,
—— ——.

STATE OF OKLAHOMA,
County of Hughes, to wit:

Johnson E. Tiger, being duly sworn, says — the next friend of the plaintiff in the foregoing petition and her guardian also; that he knows the contents of said petition; and that the facts therein contained are true to the best of his knowledge and belief.

JOHNSON E. TIGER.

Taken, subscribed and sworn to before me on this the 13th day of July, 1910.

[SEAL.] E. F. MESSENGER,
District Clerk,
By GEORGE E. WALKER, *Deputy.*

Filed Jul- 13, 1910. E. F. Messenger, Clerk of District Court Hughes County. G. E. Walker, Deputy.

35 In the District Court in and for Hughes County, Oklahoma.

NELLIE PORTER, by Next Friend, etc., Plaintiff,
vs.
OLLIE A. WILSON, CHARLES W. WILSON, OMER A. GARNER, W. M. JACKSON, and R. H. FITZGERALD, Defendants.

Answer.

Comes now Ollie A. Wilson, Charles W. Wilson, Omer A. Garner and W. M. Jackson, and for answer to the petition of the plaintiff say*s*:

Defendants admit that the lands described in the petition of plaintiff were duly allotted and patented to Ben Porter, and that Ben Porter died seized of the lands therein described; admit that said Ben Porter died intestate, but deny that the plaintiff herein was the child of Ben Porter, now deceased, or that she was related to him at all; deny that Ben Porter and Jennie McGilbray were ever married or that they lived together as husband and wife, and

deny that the plaintiff herein is the issue of such marriage between Ben Porter and Jennie McGilbray:

But allege that at the time of the death of said Ben Porter he was survived by his wife Lena Porter, and his brother Sam Porter and his sister Nannie Broadnax, who were the sole and only heirs of said Ben Porter, deceased, and that as such heirs at law of said Ben Porter, deceased, said Lena Porter, Nannie Broadnax and Sam Porter, did for a valuable consideration make, execute and deliver to these answering defendants deeds of conveyance by which they conveyed to these answering defendants an indefeasible estate of inheritance in and to all of the lands described in the petition of plaintiff, being the allotment of said Ben Porter, deceased.

36 Further answering defendants say that the plaintiff herein took no right, title or interest in and to the premises described in her petition, but allege that said Lena Porter, Sam Porter and Nannie Broadnax were the sole and exclusive heirs of the said Ben Porter, deceased.

Wherefore premises considered, defendants pray that the suit of plaintiff be dismissed, that she take nothing herein, and that the title of these answering defendants herein be quieted forever in them, and that the plaintiff and all persons claiming by, through or under her be forever enjoined from asserting any right, title or interest in and to said premises and for her costs in this action laid out and expended and for all further relief which to the Court may seem proper.

MOORE & NOBLE,
Attorneys for Defendants.

STATE OF OKLAHOMA,
Okmulgee County, ss:

Omer A. Garner, being first duly sworn, on oath says that he is one of the defendants herein; that he has read the above and foregoing answer to the petition of plaintiff in the above entitled cause, and that the allegations and things therein stated are true as he verily believes.

OMER A. GARNER.

Subscribed and sworn to before me this 26th day of July, 1910.

[SEAL.]

N. D. BOYD,
Notary Public.

My commission expires Dec. 11, 1911.

37 Endorsed: No. 582. In the District Court of Hughes County, Oklahoma. Nellie Porter, by her next friend, vs. Ollie A. Wilson, et al. Answer of defendants Ollie A. Wilson, Charles W. Wilson, Homer A. Garner, W. M. Jackson. Filed July 27, 1910. E. F. Messenger, Clerk of District Court, Hughes County, by G. E. Walker, Deputy.

38 No. 582.

NELLIE PORTER, by Next Friend, Pl'ff,
vs.
OLLIE A. WILSON et al., Def'ts.

Reply.

Comes now the plaintiff, Nellie Porter, by Johnson E. Tiger, her next friend and guardian herein, and for her reply to the answer of Ollie A. Wilson Charles W. Wilson, Homer A. Garner and W. M. Jackson, filed in this cause, deny-s that Lena Porter was the wife Porter; and further deny-s that said Lena Porter, Sam Porter and Nannie Broadnax were the sole and exclusive heirs of the said Ben Porter; and further deny-s that said Lena Porter, Sam Porter and Nannie Broadnax as the heirs of said Ben Porter ever made, executed and delivered to said answering defendants deeds of conveyance by which they conveyed to said defendants and indefeasible estate of inheritance in and to the lands described in the petition herein; and charge that said deeds do not vest in said defendants an indefeasible estate in said lands or any estate whatever, for the reason that same are void and the title to said — upon the death of said Ben Porter vested in this plaintiff as his said heir at law, and not in said Lena Porter, Sam Porter and Nannie Broadnax, as set forth in her petition herein.

NELLIE PORTER,
By Counsel, &c.

LEWIS C. LAWSON,
Counsel for Plaintiff.

Endorsed: #582. Nellie Porter, etc., Pl'ff, vs. Ollie A. Wilson et al., Def'ts. Reply of Pl'ff. Filed Sep. 29, 1910. E. F. Messenger, Clerk of District Court, Hughes County, by —— ——, Deputy.

39 In the District Court of Hughes County, State of Oklahoma.

NELLIE PORTER, etc., Plaintiff,
vs.
OLLIE WILSON et al., Defendants.

Amended Petition.

Comes now the Plaintiff by her said next friend herein, and for her amended petition herein, by leave of the Court first had and obtained, further charges and avers that said marriage between said Ben Porter and said Jennie McGilbra mentioned and referred to in her original petition, heretofore filed in this cause, was made, contracted and consummated by and between said Ben Porter and said Jennie McGilbra, under and according to the usages and customs of the citizens of said Creek Nation respecting marriages by

and among such citizens, then in full force and effect among said citizens and in said Creek Nation at the time of said marriage as so alleged in said original petition; that from and ever after said marriage said Porter and McGilbra lived, resided together and cohabited with each other as husband and wife, in accordance with, and in compliance to said usages and customs of said Nation, for and during the time so mentioned in said original petition; and of said marriage and cohabitation aforesaid by and between said Ben Porter and said Jennie McGilbra, the said plaintiff herein, Nellie Porter, was born to said Ben Porter and Jennie McGilbra; that ever after the birth of said plaintiff, the said Porter and McGilbra acknowledged and recognized this plaintiff as their lawful and legitimate child and offspring of said marriage; that from and after said marriage, the said Porter and McGilbra were recognized by the citizens of the community in which they lived, as husband and wife
40 and said plaintiff as the child and legitimate offspring of said marriage; that under and in accordance with said usages and customs of said citizens of said Nation, it was competent, legal and legally binding among said citizens, in order to become husband and wife and to marry, or to be married, simply to agree to be husband and wife and thereupon to immediately commence living together as husband and wife and to live and reside and cohabit together as husband and wife; that such contract and agreement aforesaid should be so made by and between a male and female of said tribe capable of entering into such marriage relations, and the children and offspring of such marriages and cohabitation and their descendants were, under said usages and customs, held and deemed to be legitimate, and the legal and lawful heirs of said husband and wife, after their respective deaths, and as such heir- took the estate of their deceased parents, according to the laws of distribution of said nation; that at the time of said marriage by and between said Porter and Jennie McGilbra aforesaid, the said Ben Porter and Jennie McGilbra, and each of them were competent to make and enter into such marriage relations, and did, as aforesaid, make and enter into said marriage and were so married according to said usages and customs of said Nation and the citizens thereof then in force and effect in said Nation; and that plaintiff is now the legal and lawful heir of her said father Ben Porter, and entitled as such to the lands in controversy in this suit.

Whereupon, plaintiff prays for the relief prayed for in her original petition filed in this case and for all such other, further and general relief herein as the nature of this case requires or which to equity and good conscience may seem just and proper, and he will ever pray, etc.

LEWIS C. LAWSON,
Counsel for Plaintiff.

41 Endorsed: No. 582. Nellie Porter, etc., Plaintiff, vs. Ollie Wilson et al., Def'ts. Amended Petition. Filed Jan. 21, 1911. T. E. Neal, Clerk, by A. F. Hall, Deputy.

42 In the District Court of Hughes County, State of Oklahoma.

NELLIE PORTER, Plaintiff,
vs.
OLLIE A. WILSON, CHARLES W. WILSON, OMER A. GARNER, W. M. JACKSON, and R. H. FITZGERALD, Defendants.

Answer to Plaintiff's Amended Petition.

Comes now the defendants Ollie A. Wilson, Charles W. Wilson, Omer A. Garner and W. M. Jackson and for answer to petition of plaintiff, allege:

That the lands involved in this controversy were duly allotted and patented to Ben Porter, and that Ben Porter died seized of the lands therein described; and that Ben Porter died intestate; deny that the plaintiff herein is the child of Ben Porter now deceased, or that she was related to him at all, and deny that Ben Porter and Jennie McGilbra were ever married or that they lived together as husband and wife, and deny that the plaintiff herein is the issue of such marriage between Ben Porter and Jennie McGilbra deny that there was any marriage contracted in accordance with usages and customs of citizens of the Creek Nation, and deny that there was any customs and usages in vogue in the Creek Nation relative to marriages, and deny that there was any marriage of any kind by custom or otherwise between the said Ben Porter and Jennie McGilbra; deny that the said Jennie McGilbra and Ben Porter were reputed by citizens of the community in which they lived to be husband and wife, and deny that they lived together or cohabited together as husband and wife or otherwise; deny that the said plaintiff in this case is the issue either of the marriage or cohabitation of said Ben Porter and Jennie McGilbra, and deny that she is an heir of said Ben Porter deceased.

43 Further answering the defendants say, that at the time of the alleged marriage between the said Ben Porter and Jennie McGilbra, that both the said Ben Porter and Jennie McGilbra were citizens of the Creek Tribe of Indians and that the law governing marriage and divorce as found in Constitution & Laws of Muskogee Nation, 1893, at page 108 of said law, Section 310 thereof, was as follows, to-wit:

"SECTION 310. Marriages may be solemnized by any of the judges of the Courts of this Nation or by any ordained Minister of the Gospel in regular communion with any religious society, and any marriage contracted in writing or in the presence of two or more witnesses, who shall sign the marriage contract as such, shall be lawful."

Further answering defendants allege that at the time of the death of said Ben Porter, he was survived by his wife Lena Porter, and his brother Sam Porter and his sister Nannie Broadnax who were the sole and only heirs of said Ben Porter deceased, and that as such heirs at law of said Ben Porter, deceased, said Lena Porter, Nannie

Broadnax and Sam Porter did, for a valuable consideration, make, execute and deliver to these answering defendants, deeds of conveyances by which they conveyed to these answering defendants an indefeasible estate of inheritance in and to all the lands described in the petition of plaintiff.

Further answering defendants say that the plaintiff herein took no right, title or interest in and to the premises described in her petition, but allege that the said Sam Porter, Lena Porter and Nannie Broadnax were the sole and exclusive heirs of the said Ben Porter deceased.

44 Wherefore premises considered, defendants pray that the suit of plaintiff be dismissed; that she take nothing herein and that the title of these answering defendants be quieted forever in them, and that the plaintiff and all persons claiming by, through or under her be forever enjoined from asserting any right, title or interest in or to said premises, and for their costs in this action laid out and expended and for all further relief which to the Court may seem proper.

WALKER & FANCHER &
MOORE & NOBLE.

Endorsed: No. —. Nellie Porter, Plaintiff, vs. Ollie A. Wilson, et al., Defendants. Answer to Plaintiff's Amended Petition. District Court, County of Hughes, State of Oklahoma. Filed Jan. 24, 1911. —— ——, District Clerk, By —— ——, Deputy.

45 In the District Court of Hughes County, State of Oklahoma.

NELLIE PORTER, etc., Plaintiff,
vs.
OLLIE A. WILSON et al., Defendants.

Comes now the plaintiff by her next friend, guardian, etc., and for her reply to the amended answer herein of Ollie A. Wilson, Charles W. Wilson, Omer A. Garner and W. M. Jackson herein filed on the 29th day of November, 1910, and another amended answer filed herein on this the 24th day of January, 1911, denies each and every charge, statement and allegation therein contained whereby said defendants seek to set up matters therein of and in the nature of affirmative relief except as hereinafter admitted; and denie- specifically that said Lena Porter, Sam Porter and Nannie Broadnax were the sole and exclusive heirs of said Ben Porter; that said Lena Porter, Sam Porter and Nannie Broadnax as the heirs of said Porter deceased, made, executed and delivered to said answering defendants deeds of conveyance by which they conveyed to said defendants an indefeasible estate of inheritance in and to said lands described in said petition; and deny that the purported laws of marriage set up in said amended answer were the laws of marriage of said Creek Nation therein mentioned, and denies every other charge and statement therein contained as to said marriage and divorces as therein set up in said amended answer; and denies specially that at the time of the death

of said Ben Porter, he was survived by his wife Lena Porter and his brother Sam Porter and his sister Nannie Broadnax, who were the sole and only heirs of said Ben Porter deceased, and that as such heirs at law of said Ben Porter, deceased, said Lena Porter,
46 Nannie Broadnax and Sam Porter did, for a valuable consideration, make, execute and deliver to said answering defendants deeds of conveyance by which they conveyed to said defendants an indefeasible estate of inheritance in and to said lands, and charge that such allegations therein contained are not true; and denies further that said Lena Porter, Sam Porter and Nannie Broadnax were the heirs of said Ben Porter deceased, and deny that they, or any of them, had any right, title in said lands, and also denies that this plaintiff was not the heir of said Ben Porter, and denies that she has no right, title or interest in said lands as the heir of said decedent or otherwise; but plaintiff admits *the* both said Ben Porter and Jennie McGilbra were citizens of said Creek Nation and said Creek Tribe of Indians; and charge that they, said Ben Porter and Jennie McGilbra, were citizens of said Tribe and Nation and members thereof, at the time of said marriage herein referred to in the pleadings in this case, and long prior thereto, and ever thereafter; and that long before said marriage and ever after their respective births, and during all the time of marriage to each other as aforesaid, said Ben Porter and said Jennie McGilbra, lived and resided in said Creek Nation and among and as members of said Creek Tribe of Indians.

LEWIS C. LAWSON,
Counsel for Plaintiff.

Endorsed: 582. Nellie Porter, etc., Pla'ff, vs. Ollie A. Wilson et al., Def'ts. Reply of Pl'ff. District Court, County of Hughes, State of Oklahoma. Filed Jan. 24, 1911. T. E. Neal, District Clerk, By A. F. Hall, Deputy.

47 In the District Court of Hughes County, State of Oklahoma.

NELLIE PORTER, Plaintiff,
vs.
OLLIE A. WILSON, CHARLES W. WILSON, OMER A. GARNER, and R. M. JACKSON and R. H. FITZGERALD, Defendants.

Demurrer.

Comes now defendants Ollie A. Wilson, Charles W. Wilson, Omer A. Garner and W. M. Jackson and demurs to the amended petition of plaintiff herein, and for grounds of demurrer thereto states: that the amended petition of plaintiff does not state facts to constitute any cause of action against these defendants.

FRANCHER & WALKER &
MOORE & NOBLE.

Endorsed: No. 582. Nellie Porter, Plaintiff, vs. Ollie A. Wilson, et al., Defendants. Demurrer. District Court, County of Hughes, State of Oklahoma. Filed Jan. 24, 1911. T. E. Neal, District Clerk, by —— ——, Deputy.

48 Mr. JOHN A. JACOBS, a witness, produced, sworn and examined on behalf of the Plaintiff, testified as follows, viz:

Direct examination.

By Mr. LAWSON:

Q. State your name and age?
A. John Jacobs, thirty-eight years old.
Q. Where do you live, Mr. Jacobs?
A. I live near Holdenville.
Q. Are you a member of any Tribe of Indians, if so, what?
A. Member of the Creek or Muskogee Tribe.
Q. Where have you lived during your life?
A. In this Nation.
Q. Are you acquainted with the customs and usages of the Creek Tribe and members of the Creek Tribe as to marriage?
A. Yes, sir.

By Mr. WALKER: We object, it has not been proven that they had any usage or custom.
By the COURT: They had some. Answer the question, overruled.
By Mr. WALKER: Defendant excepts.

49 By Mr. LAWSON:

Q. How long had you known of those customs and usages?
A. Ever since I was about twenty years old.
Q. Mr. Jacobs, please state to the Court what were the usages and customs prevalent among the Creeks and in the Creek Nation relative to marriages?

By Mr. MOORE: We object, he does not fix any time as to what the custom was.
By the COURT: Sustained.

By Mr. LAWSON:

Q. What was the customs and usages of the Creeks among themselves as to getting married and being married along from 1890 to 1898.

By Mr. WALKER: We object.

By the COURT:

Q. How old are you now?
A. Thirty eight.

By the COURT: Answer the question.
By Mr. MOORE: We object to the introduction of any proof here as to what the custom was as to marriages from 1890, and subsequent thereto, for the reason that subsequent to the year 1881 the law of marriage among Creek Indians was regulated and was contained in the Creek Statute and customs of the Creek people.
By the COURT: Overruled.
By Mr. MOORE: Defendant excepts.
50 By the COURT: Answer the question.

By the WITNESS:

A. Part of the time they followed the custom from 1890 to 1898, but I think it was in the year 1887, if I am not mistaken, the Creek Council passed an act legalizing all marriages—that is, where they was living together as man and wife. In that law they made three ways of legal marriages; by a District Judge, an Ordained Minister or two witnesses to the contracting parties.

By Mr. LAWSON:

Q. You are speaking of the laws now that was made. What about the customs and usages?

Q. Well, the law did not prevent the custom.

Q. What was that custom?

Q. Well, they would get together——

By Mr. MOORE: We object now to the question for the reason that the witness has already shown there was a written law.

By the COURT: Overruled.

By Mr. MOORE: Defendant excepts.

By Mr. LAWSON:

Q. Go on and tell what the custom was, independent of those laws?

A. They would take up one another and live as man and wife.

Q. According to those customs was that regarded in the Creek Nation *was* a legal, valid marriage?

A. If they was recognized it was, but in plural marriages, the first one he took up with was his legal wife.

51 Q. What about the children of such marriages as that, was they regarded as legitimate or illegitimate?

A. They was regarded as legitimate children, except the second wife.

Q. You say those customs and usages prevailed from 1890 to 1898?

A. Yes, sir.

Q. In the Creek Nation?

A. Yes, sir.

Q. Now, Mr. Jacobs, were you acquainted with Ben Porter in his lifetime?

A. Yes, sir.

Q. Was you acquainted with Jennie McGilbra, his wife?

A. No, sir.

Q. Where did Ben Porter live?

A. He lived around Okmulgee and Wetumka awhile.

Q. Within the Creek Nation?

A. Yes, sir.

Q. What blood was Ben Porter, was he Indian blood?

A. Yes, sir.

Q. What nationality of Indian?

A. Creek.

Q. Do you know whether he was a fullblood or not.

A. I don't know about that; I think he was a mixed-blood though.

By Mr. LAWSON: That is all.

Cross-examination.

By Mr. MOORE:

Q. Mr. Jacobs, I believe you stated there was an act passed by the Creek Council in 1887. Do you mean 1887 or 1881?
A. I don't remember just when it was. It was prior to 1890.
52 Q. And that act of the Council provided a means by which Indians might marry—the method?

By Mr. LAWSON: We object to that, if the Court please, for the reason that the passage of such acts by the Creek Council prescribed certain ways and manners in which the creek members might marry, does not prohibit them from being married in any other manner, and for that reason the passage of such a law is incompetent, irrelevant and immaterial in this case.
By the COURT: Overruled.
By Mr. LAWSON: Plaintiff excepts.

By the COURT:

Q. Have you the acts of the Creek Council here?

By Mr. LAWSON:

A. Yes, sir.

By Mr. MOORE:

Q. They provided a method of marriage?
A. There is only one reason I could give for such an act.
Q. It did provide for such?
A. Yes, sir; they was having some trouble with plural marriages and that is the reason they enacted the law.
Q. Now, Mr. Jacobs, I hand you here to refresh your memory, a book known as the Constitution and Laws of the Muskogee Nation, 1893, at page 108, Section 310 thereof, and ask you if that is the Act of the Council to which you referred? (Handing witness book.)

By Mr. LAWSON: Plaintiff objects to the foregoing question and any answer thereto for it is sought to be set up for the defendants themselves as affirmative matter.
53 By the COURT: Overruled.
By Mr. LAWSON: Plaintiff excepts.

By the WITNESS:

A. Yes, sir.

By Mr. LAWSON: Plaintiff moves to strike out the answer to the last question for the reason——
By the COURT: You have already objected to the question.
By Mr. LAWSON: For the reason even admitting said laws existed as therein referred to, it does not destroy the Creek customs and usages pertaining to marriages among the Creeks and in the Creek

Nation and for that reason it is irrelevant and improper in this case.

By the COURT: Overruled.

By Mr. LAWSON: Plaintiff excepts.

By Mr. MOORE:

Q. Now, Mr. Jacobs, was there any other written statute, or law, among the Creeks, governing marriages?

A. No, sir.

Q. I will ask you, Mr. Jacobs, that if, prior to the passage of this act, it had not gotten to be a very common practice among the Creeks to live together illicitly, and if this statute was not passed to remedy that evil?

A. The way I understood it, it was passed for the reason they was having trouble in these plural marriages as to inheritance of personal property.

54 Q. It had become difficult to determine the parentage of children?

A. Yes, sir.

Q. And this was the reason for the passage of this act?

A. Yes, sir; and plural marriages.

Q. Now, after the passage of this act, Mr. Jacobs, was it not incumbent upon citizens getting married lawfully to comply with that act?

A. Not necessarily.

By Mr. MOORE: That is all, Mr. Jacobs.

Redirect examination.

By Mr. LAWSON:

Q. Were you a member of the Creek Council at the time they passed the law referred to?

A. No, sir.

By Mr. LAWSON: That is all.

Witness excused.

JENNIE WASHINGTON, a witness, produced, sworn and examined on behalf of the plaintiff, testified in her own behalf, through the Interpreter, as follows, viz:

Direct examination.

By Mr. LAWSON:

Q. State your name and age?

A. My name is Jennie Washington; twenty five years old.

Q. Can you speak or understand the English language?

A. No, sir.

Q. Where have you lived during your lifetime?

A. Near Eufaula.

55 Q. In what country?

A. In Oklahoma.

Q. Are you a member of any of the Five Civilized Tribes, and if so, which Tribe?
A. Member of the Muskogee or Creek Tribe.
Q. What was your mother's name and your father's name?
A. Father's name was Daniely McGilbra and my mother's name was Lizzie McGilbra.
Q. Have you any children, and, if so, what are their names?
A. Yes, sir; I have a child named Nellie Porter.
Q. Is Nellie Porter your only child?
A. No, sir; I have other children.
Q. How many other children have you?
A. Four.
Q. Is Nellie Porter the plaintiff in this suit?
A. Yes, sir.
Q. Who is the father of Nellie Porter, the plaintiff in this suit?
A. Ben Porter.
Q. Is Ben Porter, the father of Nellie Porter, the plaintiff in this suit, living or dead?
A. Dead.
Q. State, if you know, when Ben Porter died?

By Mr. MOORE: That is all admitted in the pleadings.
By the COURT: It may be material to get at some other facts.

By the WITNESS:

A. I don't know the date.

By Mr. LAWSON:

Q. Were you and Ben Porter ever married?

By Mr. MOORE: We object to the question, it is a conclusion of law and a conclusion of fact.
56 By the COURT: Let her answer the question.
By Mr. MOORE: Defendant excepts.
By Mr. WALKER: Defendants object for the reason that it has been heretofore shown that the Creek Nation had laws controlling the manner in which Creek Indians should be married in order to create a legal marriage, and it calls for a conclusion.
By the COURT: Of course it calls for a conclusion, but you can cross examine her, overruled.

By the WITNESS:

A. Yes, sir.

By Mr. LAWSON:

Q. Was the Ben Porter to whom you were married the father of Nellie Porter, the plaintiff in this suit?
A. Yes, sir.
Q. When was you and Ben Porter married, about what time?
A. About 1895.
Q. How long did you and Ben Porter live together after you were married?
A. Over a year.

By the COURT:

Q. How old are you?

By the INTERPRETER:

A. Twenty five she said.

By Mr. LAWSON:

Q. How old were you when you and Ben married?

A. I was about sixteen.

57 Q. Where were you when you and Ben were married?

A. Okmulgee.

Q. What was going on at that time?

A. Creek Council.

Q. How did you and Ben happen to marry?

A. Well, we just married according to the Creek laws.

Q. What did Ben say to you and what did you say to Ben?

A. He asked me to marry him?

Q. And what did *she* say to him in answer to that?

A. I consented and told him all right.

Q. Where was that he asked you to marry him and you consented?

A. At Okmulgee.

Q. At the Council?

A. Yes, sir.

Q. Did you consent as quick as he asked you to marry?

A. Yes, sir.

Q. What did you and Ben then do, where did you go?

A. We went to Ben Porter's mother's place.

Q. When did you go, that day or some other day?

A. The same day.

Q. Where did you stay that night of that day you and Ben were married?

A. At Ben Porter's mother's house.

Q. How long did you and Ben stay together there at Ben's mother's after that night?

A. Over a year.

Q. Did you and Ben sleep together at his mother's all the time you were there?

A. Yes, sir.

Q. Did you sleep together the first night after you went to Ben's mother's, after you were married at the Creek Council?

A. Yes, sir.

58 Q. Did you and Ben ever go around together very much after you were married?

A. We used to go to Okmulgee.

Q. Together?

A. Yes, sir.

Q. Did Ben recognize you all this while as his wife to other people?

By Mr. MOORE: We object as a conclusion.

By the COURT: It is leading in the first place.

By Mr. LAWSON:

Q. Did Ben ever tell any one that you was his wife, if so, who?

By the COURT: I will let her answer the question.
By Mr. MOORE: Defendant excepts.

By the WITNESS:

A. Yes, one man named Lowley Alexander.

By Mr. MOORE: We move the question and answer be stricken for the reason that it does not fix any time, neither does it fix as to whether Ben Porter was present, or whether she was present, when Ben Porter made the statement, neither does it show that it was during the time of the alleged cohabitation.
By the COURT: You had better show whether she was present?

By Mr. LAWSON:

Q. Was you present at the time Ben told Lowley Alexander that you was his wife?
A. No, sir; Lowley told me.

59 By the COURT: That is not to be considered. The motion is sustained.

By Mr. LAWSON:

Q. Was Nellie Porter born before or after you and Ben separated?
A. After we separated.

By the COURT:

Q. How long after?
A. About three months after.

By Mr. LAWSON:

Q. Was Nellie Porter begotten by Ben Porter while you and Ben Porter lived together as man and wife?

By the COURT: She has already said it was Ben's child and it must have been during that time.

By Mr. LAWSON:

Q. Why did you and Ben separate?
A. He was living with another woman. Took up with another woman.

By the COURT:

Q. Was he living with the other woman when Nellie Porter was born?
A. Yes, sir.

By Mr. LAWSON:

Q. Had Ben Porter lived with any other woman before you and he were married?

By Mr. MOORE: We object as immaterial.

By the COURT: I think it is material.
By Mr. MOORE: Defendant excepts.

By the WITNESS:

A. No, sir; I don't think he did.

60 By Mr. LAWSON:

Q. Had you ever lived with any other man before you and Ben were married?
A. No, sir.

By the COURT:

Q. When did Ben Porter die?

By Mr. LAWSON:

A. In November, 1906.

By Mr. LAWSON: That is all.

Cross-examination.

By Mr. MOORE:

Q. You lived at Eufaula before you went to Okmulgee at the time you say you and Ben were married?
A. Yes, sir.
Q. How soon after you went from Eufaula to Okmulgee until you and Ben were married, or went to living together?
A. About two days after I got to Okmulgee.
Q. Then after you and Ben separated, you went back to Eufaula?
A. Yes, sir.
Q. And you never returned after that to Okmulgee?
A. No, sir.

By Mr. MOORE: That is all. Wait just a minute. The defendants now move to strike all of the testimony of this witness for the reason that it not shown by the witness, and one of the alleged contracting parties to the alleged marriage, that there was any marriage at all in conformity to the law.
By the COURT: Overruled.
By Mr. MOORE: Defendant excepts.

Witness excused.

61 ROBERT THOMAS, a witness, produced, sworn and examined on behalf of the Plaintiff, testified as follows, viz:

Direct examination.

By Mr. LAWSON:

Q. What is your name?
A. My name is Robert Thomas.
Q. How old are you, Thomas?
A. I am about fifty two years old, somewhere along there; probably a little older, I don't know exactly the date.

Q. Where have you been living during your lifetime?
A. From Texas to the Territory. I have been here about twenty four years and the balance of the time in Texas.
Q. Have you ever lived in the Creek Nation?
A. Been here about twenty three years, about Okmulgee.
Q. Have you lived continuously in the Creek Nation for the past twenty four years?
A. Yes, sir.
Q. Did you know Ben Porter in his lifetime?
A. Yes, sir; I did.
Q. How long did you know him?
A. From 1889 up until he died.
Q. Did you know his father and his mother?
A. Yes, sir; I lived with them.
Q. When?
A. I came to their place in '89 and stayed there till he died and buried him.
Q. When did he die?
A. John Porter died in 1892.
Q. Is John Porter, Ben Porter's father?
A. Yes, sir.
Q. What is Ben's Mother's name?
A. Mary.
Q. When did she die?
A. Somewhere along in '77 or '76.
62 Q. Seventy seven?
A. Ninety seven I should say.
Q. Eighteen and ninety seven you say?
A. Yes, sir '97 or '96; I am not positive just what date she did die.
Q. Was you around and about there about 1903, 1904 and 1905?
A. Right there on the place, on Porter's place.
Q. Did you see Ben Porter and Jennie McGilbra living together?
A. I didn't see them living there; I seen them bring the child there.
Q. Nellie Porter you mean?
A. Yes, sir.
Q. Well, whose child is Nellie Porter?
A. At that time Jennie McGilbra claimed to be the mother of it, and Ben Porter the father of it.

By Mr. MOORE: We object to what they claimed.

By the COURT:

Q. Did the father and mother claim it was their child?
A. Yes, sir.
Q. Which one said that?
A. Ben Porter told me it was his.

By Mr. LAWSON:

Q. Did you hear anybody else say so?
A. I heard his mother say it was Ben's.

Q. How long did the little child stay there with its grand mother?

A. It was there for two or three days to the best of my knowledge. I didn't live right in the yard with them, I lived off a little.

Q. Do you know how long Ben Porter and his wife lived there with the mother?

A. No, sir; I really don't know.

63 Q. Did they live there at all?

A. They was there, stayed around there I don't know how long. I saw them there. I saw the child there and Ben was in and out all the time.

Q. And you saw the child's mother there?

A. I saw her there once.

Q. Jennie McGilbra?

A. Supposed to be. At that time I wasn't acquainted with her.

Q. Do you remember about what time Ben Porter and Jennie McGilbra were married?

By Mr. MOORE: We object, he has not stated that.

By the COURT: He has not stated that.

By the WITNESS:

A. To the best of my knowledge they must have went together somewhere probably between 1897 and '96. I haven't got directly the date, it was somewhere along there to the best of my knowledge; it has been so long since it occurred.

Q. After they come together, how long did they live together?

A. I don't know.

Q. Well, Robert, are you acquainted with the Creek Customs and usages of marriages that was in force among the Creeks at the time you was living there?

By Mr. MOORE: We object, he has not testified there was any custom.

By the COURT: There was.

By the WITNESS:

A. At that time where there was a mutual agreement between the two, it was considered legal, and they went together and lived together without any ceremony or license at that time.

64 Q. Just took up with one another?

A. Yes, sir; and the Creek law did not prohibit it.

Q. Did you ever hear Ben Porter say anything about whose child Nellie was?

A. He told me it was his child. He said he was the father of it, that is about all I know.

By Mr. MOORE: We object to that.

By Mr. LAWSON:

Q. Did you hear anyone in the community around there say

whether Ben and Jennie were married, and, if so, what did they say?

By Mr. MOORE: We object to that.
By the COURT: Overruled.
By Mr. MOORE: Defendant excepts.

By the WITNESS:

A. They called them man and wife by mutual agreement.

By Mr. LAWSON:

Q. Was Ben and Jennie considered man and wife at that time?
A. That was under mutual agreement.
Q. By the neighbors?
A. Yes, sir and the people in general.

By Mr. LAWSON: That is all.

Cross-examination.

By Mr. MOORE:

Q. Are you the same Robert Thomas that testified before the department at Okmulgee in this matter several months ago?
A. I am.
Q. You know about as much about it now as you did then?
A. I guess I do.
Q. Are you the same man that stated at that time that you was present at Mary Porter's when this baby was born?
A. No, sir; I didn't make that statement.

By Mr. MOORE: That is all.

By direct evamination.

By Mr. LAWSON:

Q. Are you acquainted with Charles Wilson one of the defendants in the case?
A. Yes, sir.
Q. Did he ever offer you any money in the case to testify?
A. He said, "If I would get straight on the case, we would come together easy."
Q. Who did?
A. I and him in the court.
Q. What did he mean by that?
A. I don't know what he meant by that.
Q. He said if you would get straight?
A. Yes, sir.
Q. What did he mean?
A. He wanted me to get the dates and give it to him in writing concerning the matter, and we was out of court and I didn't feel under obligation to do that.
Q. Isn't it a habit in getting evidence in cases of this kind, to get affidavits and introduce them in court?

A. I couldn't answer that question.

By the COURT: Don't answer that question.

By Mr. LAWSON:

Q. Was he wanting you to make affidavit to that?
A. To the dates, Your Honor.
66 Q. You wouldn't do it?
A. I couldn't do it.

By Mr. LAWSON: That is all.

By the COURT:

Q. You say you was in there when the child was born?
A. No, sir; the child wasn't born on the place where I was living, it was born down near Eufaula and brought up there.
Q. You say Ben told you it was his child?
A. Yes, sir. We was guying him and told him he was mighty young to start out with a family, and he says, "A young cat likes cheese as well as an old one, and it is mine just the same."
Q. Do you talk the Creek language?
A. No, sir.
Q. He could talk English?
A. Yes, sir; he went to school all the time.
Q. In speaking of it, was the child there at his mother's house.
A. Yes, sir.
Q. Was the mother of the child there at this time?
A. I would not be positive. The child was there a day or two but I did not see the woman.
Q. How old was the child at that time?
A. I am unable to answer that question; it was a baby I could not tell what age.
Q. Was it two or three months or a year old?
A. I don't guess it was a year old; it was a good big sized child.
Q. What did he say about the mother of the child, did he talk about the girl as his wife?
A. He says this, "I have got a wife." The Indians called it "custom wife."
67 Q. What did he say?
A. When we got to telling him about it he says, "I had just as well marry as anybody."
Q. Where was he living at that time?
A. Ben Porter?
Q. Yes?
A. He was up at his mother's, but he was living down about Eufaula and come up.
Q. Who was he living with?
A. I don't know. I could not answer that question.
Q. You say he said he was married?
A. He called her his wife.
Q. You don't know whether he was talking about this woman or not.

A. Bound to be talking about her, when we was talking about the child and he told us, "A young cat likes cheese as well as an old one."

Q. How come you to be teasing him about the child?

A. I had knowed him from a school boy and he had run off and had this child, and it got quiet and he come back to his mother's and we was out at the barn from the house.

Q. How old was he at that time?

A. Oh, I have no idea.

Q. Well, about how old?

Q. I guess at that time he might have been about fifteen or sixteen. He was a long gangling legged boy.

Q. He wasn't grown?

A. No, sir; he wasn't grown.

Q. You never saw him in company with the woman at his mother's house?

A. No, sir; never saw him carry her any where.

68 Q. Was that the only conversation you had with him about the woman?

A. He went back and I never saw him any more till he was arrested.

By the COURT: That is all.

Redirect examination.

By Mr. LAWSON:

Q. Ben was finally sent to the penitentiary?

A. Yes, sir; he was.

By the COURT:

Q. For how long?

A. Three years, I think.

By Mr. LAWSON:

Q. That was after he and Jennie was married and after the child was born?

A. Yes, sir.

By the COURT:

Q. Do you know whether he lived with any other woman after he left Jennie?

A. Yes, sir.

Q. Who was it?

A. A woman they called Lena. I don't know her other name.

Q. Did he bring her to his mother's?

A. His mother was dead then.

Q. Did he bring her to his father's?

A. Yes, sir.

Q. Was that before or after he had been in the penitentiary?

A. After that.

Q. Did you ask him what become of the child, the plaintiff in this suit?

A. No, sir; I never asked him that; they had done so bad; they had from five to six women they called their wives, and some had ten.

69 Q. How many did he have?

A. He had two.

Q. How old was he when he had his second woman?

A. I don't know; he went off to the penitentiary and was gone three years.

By the COURT: That is all.

By Mr. LAWSON: That is all.

Recross-examination.

By Mr. MOORE:

Q. At the time that you had this conversation with Ben about the child and about this woman having been his wife, that was after Jennie had left?

A. I don't know whether she had left; the child was there.

Q. That was after Jennie went to Eufaula?

A. I don't know; the child was in the house. I seen the child in Mrs. Porter's arms, that is the reason I know it.

By Mr. MOORE: That is all.

By Mr. LAWSON:

Q. The mother of the child might have been in the house for all you know?

A. That is what I say; I wasn't in there.

By Mr. LAWSON: That is all.

Witness excused.

By Mr. MOORE: I move that all of the testimony of this witness relative to any conversation that he had with Ben Porter be stricken out, that occurred subsequent to the alleged time of the cohabitation.

By the COURT: Overruled.

70 By Mr. MOORE: Defendant excepts.

JOHN LOWE, a witness produced, sworn and examined on behalf of the Plaintiff, testified as follows, viz:

Direct examination.

By Mr. LAWSON:

Q. State your name and age?

A. John Lowe is my name.

Q. How old are you?

A. Going on thirty six.

Q. Where do you live, Mr. Lowe.

A. Live at Hoffman.

Q. Where is that?

A. Hoffman, Oklahoma, on the M. O. & G.
Q. Are you a member of the Creek Tribe?
A. Yes, sir.
Q. Where have you lived during your lifetime?
A. I lived around Okmulgee and around Grave Creek.
Q. Did you know Ben Porter in his lifetime?
A. Yes, sir.
Q. Are you any relation to Ben Porter?
A. First cousin.
Q. Do you know Nellie Porter, the plaintiff in this suit?
A. Who.
Q. Nellie Porter?
A. No, I don't know; I didn't know her name.
A. Did you ever have any conversation with Ben Porter about whether he had a child or not, if so, what did he tell you?

By Mr. WALKER: We object unless he confines it to this particular child.

71 By Mr. LAWSON:

Q. Did Ben Porter ever tell you Nellie Porter was his child, or anything of that kind?

—. ——.

By the COURT:

Q. Did you ever have a conversation with Ben Porter about his child or any of his children?
A. There was one child but I don't know its name; he said it was his.
Q. Did he tell you who the mother of the child was?
A. Yes.
Q. Who did he say the mother was?
A. Jennie McGilbra was its name.

By Mr. LAWSON:

Q. Did Ben and Jennie have more than one child?
A. I don't know; they wasn't living together then. I don't think it was his legal wife.
Q. Did you know Ben Porter's mother?
A. Yes, sir.
Q. What was her name?
A. Mary.
Q. Did you ever hear Mary Porter say anything about Nellie Porter this child?
A. She told me it belonged to Ben; that is all she ever told me.
Q. How many times did she tell you that?
A. Once is all.
Q. About when was that Mary told you that?
A. I don't know when that was. I think it was somewhere along about eighteen—between '95 and '96.

By Mr. LAWSON: That is all.

72 Cross-examination.

By Mr. MOORE:

Q. John, you say you are a cousin of Ben's?
A. Yes, sir.
Q. What did you say your age is now?
A. Going on thirty six.
Q. Ben's mother and your mother were sisters?
A. Yes, sir.
Q. Did you know Ben well in 1893 and along there?
A. I have knowed him all my life.
Q. You were with him often and visited at his home?
A. I was from about '89 to '96.
Q. And saw him often?
A. Yes, sir.
Q. Did you visit with Ben at his mother's home near Okmulgee?
A. I stayed there quite awhile.
Q. You say you knew Jennie McGilbra?
A. Yes, sir.
Q. By what name did she go along in 1893 and 1894?
A. Jennie McGilbra.
Q. If you know, when was Ben Porter ever married first lawfully?
A. I wasn't here in this Territory when he married lawfully.
Q. Whom did he marry lawfully?
A. I think it was Lena Canard.
Q. Was she his wife at the time of Ben's death?
A. I guess so; I wasn't here.
Q. You do know, do you not John, that Ben and Jennie, the woman you called Jennie McGilbra, were not husband and wife?
A. I don't think they was at this time.
73 Q. They never were married?
A. No, sir.

By Mr. MOORE: That is all.

Redirect examination.

By Mr. LAWSON:

Q. How do you know they wasn't married?
A. They wasn't living together then.
Q. Is that your only reason—You mean they wasn't living together at the time Ben and Lena were living together?
A. They wasn't legally married I know at this time.
Q. What time do you refer to, at the time Ben and Lena was living together?
A. At the time Ben and Lena was living together?
Q. Yes, isn't it a fact that Ben was sent to the penitentiary and took up with Lena after he came back?
A. I think he took up with Lena before he went to the penitentiary, if I am not mistaken.
Q. When was he sent to the penitentiary?

A. I don't know.

By Mr. MOORE: He went to the penitentiary in 1902.

By the WITNESS:

A. I don't think I was here when he went to the penitentiary I was in Texas.

By Mr. LAWSON:

Q. You wasn't there either when Ben and Jennie were married?
A. I don't think they ever was married.
Q. You wasn't there when they were married, were you?
—. ——.

By the COURT:

Q. You say you have talked to Ben's mother about this child Nellie?

74 A. No, sir; Jennie came to Mary Porter's one time, and she told me the child belonged to Ben, and Ben had the child in his lap and told me it was his.

Q. Did they talk at that time like married people, or did they talk like it was an illegitimate child?
A. It was born out of wedlock.
Q. Did she talk like it was a legitimate child or not?
A. She didn't stay there long enough for anybody to tell.
Q. How long did she stay?
A. I don't know; she didn't stay long.
Q. Do you know what she came there for?
A. No, sir.
Q. How long after the child was born was it until she was there?
A. I don't know how old the child was; it was quite small.
Q. Was Ben at that time living with any other woman?
A. I think not.
Q. He was living with his mother?
A. Yes, sir.
Q. Did she stay a week or ten days?
A. I don't remember how long; it wasn't long.
Q. Did she say anything about him being her husband, or he say anything about her being his wife?
A. No, he didn't say anything to me.
Q. What did Ben's mother call them, did she speak like they was husband and wife?
A. No, sir; she didn't say anything, only she said the child belonged to Ben.
Q. Could you tell from the way they talked whether they considered that a legitimate child or an illegitimate child?
A. I don't know about that.
Q. Do you know who named the child.
A. No, sir.

75 Q. You don't know whether they called the child Porter or McGilbra at that time?
A. No, sir.

By the COURT: That is all, you may stand aside.

By Mr. WALKER:

Q. Didn't you state to the Court that they treated it—In your estimation they treated it as an illegitimate child?
A. No, sir; I don't think I did.

By Mr. MOORE:

Q. Just one other question. Now, at the time Jennie stayed around Okmulgee there, you stated that she always went by the name of Jennie McGilbra?
A. Yes, that is all I know.
Q. She traveled around considerably, didn't she?
A. I think she did.
Q. Did she or did she not stay around what is called "Big Nellie's Place?"
A. I heard some say she stayed there.
Q. You knew the place?
A. Yes, sir.
Q. What kind of a place was that?

By Mr. LAWSON: We object to that.
By the COURT: I don't think it is competent.

By Mr. MOORE:

Q. Did you know at that time what Jennie's general reputation in the community was?

By Mr. LAWSON: I object to that at this time.

76 By Mr. MOORE:

Q. As to whether she was a chaste or unchaste girl?
A. I have heard so many say she was a kind of loose character.

By Mr. LAWSON: Plaintiff objects and asks that the answer be stricken.
By the COURT: Overruled.
By Mr. LAWSON: Plaintiff excepts.

By Mr. MOORE:

Q. Do you know who came up to Okmulgee with Jennie?
A. I don't know.

By Mr. MOORE: That is all.

Witness excused.

MARY GRAYSON, a witness, produced, sworn and examined on behalf of the Plaintiff, testified as follows, viz:

Direct examination.

By Mr. LAWSON:

Q. Please state your name?
A. Mary Grayson.

Q. How old are you Mary?
A. About thirty-nine.
Q. Are you a member of the Creek Nation?
A. Yes, sir.
Q. Where have you lived during your life?
A. Around Okmulgee.
Q. Did you know John Porter and Mary Porter, the father and mother of Ben Porter?
A. Yes, sir; I knew them.
Q. How long did you know them?
A. Ever since I can remember.
77 Q. Are they living or dead?
A. Dead.
Q. Do you know Nellie Porter, the plaintiff in this case?
A. No, sir.
Q. Did you ever have any conversation with Ben Porter about Nellie being his child?
A. No, sir.
Q. Did you have any with his mother?
A. Yes, sir.
Q. What did Mary, his mother, tell you about Nellie?

By Mr. MOORE: We object, what Mary Porter may have said would be immaterial, it does not fix any time or place at which the conversation occurred.
By the COURT: Overruled.
By Mr. MOORE: Defendant excepts.

By the WITNESS:

A. She had a little child about a year or a year and a half old, and she said that was Jennie McGilbra's child that was claimed to be Ben Porter's child, that Ben Porter was the father of this child.
Q. About when did Mary Porter tell you that?
A. In 1896.
Q. How long after that till Mary Porter died?
A. She died in '07 in the winter.

By the COURT:

Q. How old was the little child at that time?
A. About a year or year and a half old.
78 Q. At that time?
A. Yes, sir.
Q. Was the little child there with the grandmother at this time?
A. She had it.
Q. You saw the little child?
A. Yes, sir.
Q. Do you recollect what they called it?
A. No, sir; they never called no name at all.
Q. How was it among the Indians at that time, did they name the children as soon as they were born, or did they let them go?
A. Some of them named them and some didn't.

By Mr. LAWSON:

Q. Mary, did you know Jennie McGilbra, the mother of that child?
A. Yes, sir.
Q. Did you know her reputation for chastity in the community in which she lived at that time?
A. No, sir; never heard anything about her at all.
Q. Never heard anything against her?
A. No, sir.
Q. Did you know a woman over there called Big Nellie?
A. Yes, sir.
Q. Did Jennie ever live there at Big Nellie's?
A. Not that I know of.
Q. The fact is that Jennie McGilbra had a good reputation over there?

By Mr. MOORE: We object to that.
By the COURT: Go ahead.
By Mr. LAWSON: That is all.

79 Cross-examination.

By Mr. MOORE:

Q. Mary, Jennie wasn't around Okmulgee very much, was she?
A. Not very much.
Q. By what name did she go there?
A. Jennie McGilbra.

By Mr. MOORE: That is all.

Redirect examination.

By Mr. LAWSON:

Q. Do you know Charles Wilson, one of the defendants?
A. Yes, sir.
Q. You interpreted before the Indian department respecting this child at Okmulgee?
A. Yes, sir.
Q. Didn't Mr. Wilson come and want you to testify and you told him you knew it was Ben Porter's child?
A. He asked me as I went through the gate if I knew anything about Ben's folks, and I told him I knew he had a half sister, and I told him they said Jennie McGilbra had a child by him.
Q. Did he try to get you not to say anything about it?
A. No, sir; he didn't say that.

By the COURT:

Q. Did he offer you money or try to bribe you?
A. No, sir; he just asked me if it was a lawful child and I told him I didn't know.
Q. You say you are a member of the Muskogee Tribe of Indians?
A. Yes, sir.

Q. Lived her all your life?
A. Yes, sir.
Q. What was the custom of the Indians with reference to the wife taking the husband's name, did she take his name or not?
A. Yes, sir.
80 Q. Since 1890 has that been practically the universal custom, or is there frequently cases where the woman does not take the husband's name?
A. Sometimes they don't. When they would have anything to do around the Court House they would ask them who their husband was.
Q. What is the custom among themselves with reference to the wife being called by the husband's name?
A. They hardly ever went by the husband's name before the Daws Commission made the ruling.
Q. Along in 1903 and 1905?
A. It was about half and half, some went by their husband's name and some didn't.

By the COURT: That is all.

Witness excused.

BETTIE MCINTOSH, a witness, produced, sworn and examined on behalf of the Plaintiff, testified, through the Interpreter as follows viz:

Direct examination.

By Mr. LAWSON:

Q. State your name and age?
A. Bettie McIntosh; I guess I am about thirty-four.
Q. Did you know Mary Porter, the mother of Ben Porter?
A. Yes, sir.
Q. Did you know Ben Porter in his lifetime?
A. Yes, sir.
Q. Do you know Nellie Porter?
A. I do not.
Q. Did you ever have any conversation with Mary Porter or Ben Porter about whose child Nellie Porter was?
A. Ben's mother told me it was a child claimed to be Ben's.
81 By Mr. MOORE: We object to that question and ask that the answer be stricken.
By the COURT: Overruled.
By Mr. MOORE: Defendant excepts.

By Mr. LAWSON:

Q. When did Mary tell you that Nellie was Ben's child?

By the COURT: She has not identified the child by the name of Nellie Porter.

By Mr. LAWSON:

Q. When did Mary tell you this?
A. About 1897 she told me, while she was in good health, she died in 1907 I think.
Q. Where was the child about whom she was talking at that time?
A. She told me that Jennie McGilbra had a child by Ben.
Q. Did she tell you what the child's name was?
A. No, sir.
Q. Where was the child when she was telling you this?
A. The child was at her mother's.

By the COURT:

Q. At Ben's mother's?
A. At the child's mother's.

By the COURT: Well, she don't know.
By Mr. MOORE: I would like to have that question stricken.
By the COURT: Sustained; she cannot know that.

82 By Mr. LAWSON:

Q. Where was Ben at the time that Mary told you this?
A. I couldn't say where he was at; he might have been at town or somewhere else.
Q. Where was Jennie McGilbra at that time?
A. She was living down about Eufaula.

By the COURT:

Q. Did she say whether Ben was living with her then or not?
A. No, she didnt say; I don't remember.

By Mr. LAWSON:

Q. Did Mary tell you anything about Jennie and Ben being married?
A. I don't remember.

By Mr. LAWSON: That is all.

By the COURT:

Q. Had you heard that they were married, that Ben and Jennie were married, had you heard that any where before that?
A. I saw Jennie McGilbra at Mary Porter's.

By the COURT: Stand aside.
By Mr. MOORE: We would ask the Court now to strike all of this testimony.
By the COURT: I will leave it in.
By Mr. MOORE: Defendant excepts.

Cross-examination.

By Mr. MOORE:

Q. Did you know Jennie when she was at Okmulgee?
A. Yes, sir; I went to school with her.

83 Q. By what name did she go?
A. Jennie McGilbra.

By the COURT:

Q. Among the Creek people, the Muskogee people, was it customary for the woman to take the husband's name and be called by the same name of the husband when they got married?
A. I don't know.

By Mr. MOORE:

Q. When were you married?

By Mr. LAWSON: We object as immaterial.
By the COURT: Let her answer.

By Mr. MOORE:

Q. You married George McIntosh?
A. In June, 1903.
Q. You had not been married before that?
A. No, sir.
Q. What was your name before you married George?
A. Bettie Thompson.
Q. When girls got married along in 1890 or 1893, fifteen or eighteen years ago, you remember that, did they not take the name of the man they married?
A. Yes, sir; I don't know.
Q. That has been your experience, you have noticed they always took the name of the man they married—you took the name of your husband?
A. Yes, sir.
Q. And Josie took the name of her husband?
A. Yes, sir.

Witness excused.

84 MARY GRAYSON, a witness, being recalled on behalf of the Plaintiff, testified as follows, viz:

Direct examination.

By Mr. LAWSON:

Q. You are the same Mary Grayson that was on the stand a while ago?
A. Yes sir.
Q. Do you know how Ben Porter and Nellie McGilbra were regarded in the community where they lived, whether they were man and wife or not?

By the COURT: You mean Jennie McGilbra?
By Mr. LAWSON: Yes, sir.
By Mr. MOORE: We object.
By the COURT: Let her answer.
By Mr. MOORE: Defendant excepts.

By the WITNESS:

A. Just around in the community they spoke as though she was his wife.

By Mr. LAWSON:

Q. The people of the community spoke of them as man and wife?
A. Yes, Jennie as Ben Porter's wife.

By Mr. LAWSON: That is all.

Cross-examination.

By Mr. MOORE:

Q. What community do you mean?
A. Around Okmulgee and Caseettha Town.
85 Q. Jennie wasn't around there much?
A. I don't know how long she was there.
Q. Did you ever hear anybody say they was husband and wife, that they was married?
A. No, sir; I never heard anybody say they was married.

By Mr. LAWSON:

Q. They spoke of them as if they were husband and wife?
A. Yes, sir.

By Mr. MOORE:

Q. Who did?
A. It was just commonly known as you would know of a freight train wreck on the track; nobody never come to me and told me they was married.

By Mr. LAWSON:

Q. As a matter of fact they spoke of them and treated them in the community where they lived as man and wife?
A. I don't know anything about the treatment. I heard them speak of Jennie McGilbra as being one of Ben Porter's wives.

By the COURT:

Q. Did you know of his having anything to do with other women?
A. He was living with some woman all the time after he was any size at all.
Q. Do you know whether he lived with any other woman before he took up with this woman?
A. I don't know that he did.
Q. Did you know of him living with any other woman after they separated?
A. I don't know whether they separated or not; she claimed that was the reason she went home because he had another woman.
86 Q. Do you know who the other woman was?
A. Lena Porter.
Q. How long did he live with her?

A. Several years, off and on.
Q. Do you know whether they went through the marriage ceremony?
A. I don't think they did.
Q. Was any children born to them?
A. I don't know; she is here.

By the COURT: That is all.

Witness excused.

WILLIAM SULLIVAN, a witness, produced, sworn and examined on behalf of the Plaintiff, testified, through the Interpreter, as follows, viz:

Direct examination.

By Mr. LAWSON:

Q. State your name and age?
A. My name is William Sullivan, about fifty-four years old.
Q. Did you know John Porter and Mary Porter, the father and mother of Ben Porter, deceased?
A. Yes, sir.
Q. Are you a member of the Creek Tribe?
A. Yes, sir.
Q. How long did you know John and Mary Porter?
A. I have known them since thirty years ago.
Q. Did you live in the communty of John Porter and Mary Porter?
A. I didn't live there, but I was in the community and worked.
Q. When?
A. It was somewhere in 1880 when I was working in there.
87 Q. Did you know Ben Porter, the father of Nellie Porter?
A. Yes, sir.

By Mr. WALKER: We object to the form of the question and ask that it be stricken.

By the COURT: He is acquainted with Ben Porter and that is all that is material about it.

By Mr. LAWSON:

Q. Is Ben living or dead?
A. Dead.
Q. About what time did he die?
A. I don't know the date; it was something like five years ago, maybe more.
Q. Did he have any children?
A. I know of one.
Q. What is her name?
A. Nellie Porter.
Q. Who was Nellie Porter's mother?
A. Jennie Washington.
Q. What was Jennie Washington's other name?

A. Jennie Porter.
Q. Was Ben Porter and Jennie married, if so, when?
A. I never seen them get married, but I have seen them together according to the custom and I thought they was man and wife; it was in about the year 1894 when I saw them.

By Mr. MOORE: We move that the question be stricken.
By the COURT: I think it is competent.
By Mr. MOORE: Defendant excepts.

By Mr. LAWSON:

Q. How was Ben and Jennie regarded in the community in which they lived, as man and wife or not?

88 By Mr. MOORE: We object to the question.
By the COURT: Overruled.
By Mr. MOORE: Defendant excepts.
By Mr. WALKER: He has not established where they lived.
By the COURT: Overruled.
By Mr. WALKER: Defendant excepts.

By the WITNESS:

A. They was considered as man and wife.

By Mr. LAWSON:

Q. In the community in which they lived, while they was living together as man and wife?

By the COURT: He has already answered that.

By Mr. LAWSON:

Q. Do you know when Nellie Porter was born?
A. 1895, I think.
Q. How long did Ben and Jennie live together as man and wife?
A. Pretty near two years.
Q. Was Nellie born before or after they separated?
A. The baby was born at Jennie's mother's place.
Q. Was it after the separation or not?

By the COURT: Ask him if they were living together at the time the child was born?

By the WITNESS:

A. Yes, sir; I think they was. After the baby was born she went back to Okmulgee.

89 By Mr. LAWSON:

Q. Back to the home of Ben Porter?
A. Yes, sir.
Q. Jennie's mother lived down about Eufaula, did she not?
A. Yes, sir.
Q. And Nellie was born down there, was she not?
A. Yes, sir.
Q. Ben and his mother lived up close to Okmulgee, did they not?

A. Yes, sir.
Q. Now, after the child was born and Jennie went back up to Okmulgee, did she and Ben live together again?
A. Yes, sir; she went up there and lived awhile and they separated and she came on down to Eufaula.
Q. Did you ever have any conversation with Ben about him and Jennie being married?
A. No, sir; we have had conversations but not on that subject.
Q. Did Ben ever tell you anything about Nellie being his child?
A. Yes, sir; he told me he had a child, but he didn't say what child.
Q. Did he say who the child's mother was?
A. No, sir; but I just had an impression it was Jennie because he was living with him.

By Mr. LAWSON: That is all.

Cross-examination.

By Mr. MOORE:

Q. You live down near Eufaula?
A. Yes, sir.
Q. You have lived there nearly all your life, have you not?
A. Yes, sir.
Q. You live west of Eufaula.
A. Yes, sir.
Q. How far is that from Okmulgee?
A. About twenty miles.
Q. How old are you?
A. About fifty four years old.
Q. How long has it been since you came back from the penitentiary?
A. Pretty near twenty years.
Q. Haven't you been in the penitentiary more than once?
A. Just once.
Q. You went to the penitentiary for perjury?
A. No, sir.
Q. What did you go for?
A. Whiskey.
Q. How long did you stay?
A. A year and a month.
Q. Do you know when Jennie was married to Sampson Harley?
A. Yes.
Q. When was that?
A. It is over ten years ago.
Q. Hadn't Jennie been married to a man named McIntosh before she married Harley?
A. Yes, sir; named Lewis McIntosh.
Q. Do you remember when this child was born at Jennie's mother's, do you remember of it having been born there?
A. Yes, sir.

Q. Now, at the time this child was born, were not Jennie and Lewis McIntosh then married?
A. No, sir.
Q. Now long after the child was born until Jennie and Lewis McIntosh were married?
A. About five years.
91 Q. Did Jennie marry Lewis McIntosh before she married Harley?
A. Yes, sir.
Q. Did you know Jonas Deer?
A. Yes, sir.
Q. Did Jonas Deer and Jennie used to be man and wife?
A. No, sir.
Q. Did Jonas Deer take Jennie places and didn't he take her to Okmulgee?
A. I don't know.
Q. Is Jennie married now?
A. Yes, sir.
Q. What is her husband's name?
A. Watsey Washington.
Q. How many times, if you know, has Jennie been married?
A. Four times.
Q. Now, what you have said about Jennie having been up to Okmulgee and Ben being married, and being known as man and wife, you are just guessing at it, aren't you?
A. No, sir; I used to go back and forth to Okmulgee and I stopped there.
Q. You stated awhile ago after this child was born, Jennie went back to Okmulgee and lived with Ben Porter, didn't you?
A. Yes, sir.
Q. Now, is that so?
A. Yes, sir.
Q. Are you just as positive that is true——

By the COURT: It is not necessary to ask that question; it don't prove anything.

By Mr. MOORE: That is all.

92 Redirect examination.

By Mr. LAWSON:

Q. Isn't Lewis McIntosh dead?
A. Yes, sir.
Q. When did he die?
A. About 1902.
Q. Sampson Harley is also dead?
A. Yes, sir.
Q. When did he die?
A. Been about three years ago.
Q. Jennie McGilbra lived with Ben Porter first, didn't she?
A. Yes, sir.

Q. Then after they separated, she took up with Lewis McIntosh?
A. Yes, sir.
Q. And then Sampson Harley?
A. Yes, sir.
Q. And now she is married to Washington?
A. Yes, sir.
Q. Did you know the reputation of Jennie McGilbra in the community in which she lived at that time, or lives now?

By Mr. MOORE: We object to the question.
By the COURT: Overruled.
By Mr. MOORE: Defendant excepts.

By the WITNESS:

A. Yes, sir; I know it. I never heard anything out of the way as I know of.

By Mr. LAWSON:

Q. How long have you known Jennie, the mother of Nellie?
A. I know her ever since she was a child. I know the whole family; there is several other brothers and sisters.

93 By the COURT:

Q. Are you any kin to Jennie McGilbra or her family, or Ben Porter or any of his family?
A. No, sir.

By Mr. WALKER:

Q. Ask him if he is any clan kin?
A. I don't know.

By Mr. MOORE:

Q. You didn't belong to the same town with either Porters or McGilbras, did you?
A. No, sir.

By the COURT: How many towns among the Creeks?
By Mr. MOORE: I don't know. There is a whole lot of them.

Witness excused.

ROLEY ALEXANDER, a witness, produced, sworn and examined on behalf of the Plaintiff, testifies through the Interpreter, as follows, viz:

Direct examination.

By Mr. LAWSON:

Q. State your name?
A. Roley Alexander.
Q. How old are you, Roley?
A. About thirty one.
Q. Are you a Creek Indian?
A. Yes, sir; I think so.

Q. Did you know Ben Porter?
A. Yes, sir.
Q. How long had you known Ben Porter before he died?
A. I don't know how long it was, but I have known him since he was a little boy; we used to go together.
94 Q. Did you know Jennie McGilbra?
A. Yes, sir.
Q. Was Ben Porter and Jennie McGilbra ever married?
A. I don't know whether they was married or not, but they used to come to our house together and go back—back and forth.
Q. Do you mean come to your father's house?
A. Yes, sir.
Q. How far was it from your father's house to where Ben and Jennie lived?
A. About a mile and a half north from my father.
Q. Did Jennie and Ben come to your father's house together?
A. Yes, sir.
Q. Now, about when was this that they kept coming to your father's house?
A. I don't know what time it was.
Q. Did they have any children?
A. No, sir; not at that time.
Q. Did they have any children after that time?
A. Yes, sir; he told me they had one.
Q. Who told you?
A. Ben Porter; it was down at Eufaula.
Q. How long before this was it that they kept coming to your father's house together that this child was born?

By the INTERPRETER: I can't get that question.
By Mr. MOORE: We object for the reason that no relation has been shown, and the reason they went to the house together or went together is immaterial.
By the COURT: Overruled.
By Mr. MOORE: Defendant excepts.
95 By the INTERPRETER: Ask that question again.

By Mr. LAWSON:

Q. Did Ben tell you what the name of the child was?
A. No, sir; he just told me that he heard a child was born for him down at Eufaula; he hadn't been down but he was aiming to go.
Q. When was it that Ben told you that?
A. I don't know when that was. I just know the circumstance and that is all; I don't know the dates at all.
Q. Did Ben tell you who the mother of the child was?

By Mr. MOORE: We object to that question for the reason he has not identified the alleged child with the plaintiff in this case.
By the COURT: Overruled.
By Mr. MOORE: Defendant excepts.

By the WITNESS:

A. Jennie.

By Mr. LAWSON:

Q. Was that Jennie McGilbra?
A. Yes, sir.
Q. Did you ever hear Ben's mother, Mary, say anything about Nellie Porter in any way?

By Mr. MOORE: We object, the time and place is not fixed.
By the COURT: I think it is competent.
By Mr. MOORE: Defendant excepts.

By the WITNESS:

A. No, sir.

96 By Mr. LAWSON:

Q. Where was Ben and Jennie living at the time you say they was coming to your father's house?

By Mr. WALKER: Defendant objects; there is no testimony to show that they were living any where.
By the COURT: Overruled, they must have been living somewhere.
By Mr. WALKER: Defendant excepts.

By the WITNESS:

A. They was living at a house that father had built; that Ben's father had built.
Q. Was they living with Ben's father and mother at that time?
A. Yes, sir.
Q. How long did Ben and Jennie live with his father and mother?
A. About a year.
Q. At the time that Ben and Jennie were coming to your father's house, was they regarded in the community there in which they lived as husband and wife, or otherwise?

By Mr. MOORE: We object to the question.
By the COURT: Overruled.
By Mr. MOORE: Defendant excepts.

By the WITNESS:

A. I don't know what the community thought, but he told me himself that they was man and wife; that he had married her.

97 By Mr. LAWSON:

Q. How did other people in the community treat them and look upon them?

By Mr. MOORE: We object, he has answered that.
By the COURT: He said he didn't know.
By Mr. LAWSON: I believe that is all.

Cross-examination.

By Mr. MOORE:

Q. You say you are thirty one years old?
A. Yes, sir.
Q. Now, at the time you say Jennie was at Ben Porter's mothe and father's place, you were just a little boy then, were you not?
A. I wasn't no little small boy; I was on up in age and I know everything that happened.
Q. Was not Ben Porter younger still than you?
A. Yes, sir.
Q. You testified up at Okmulgee in this hearing before the Di trict Agent, did you not?
A. Yes, sir.
Q. You said up there that this Jennie was a girl that came Mary Porter's house and she hired her for a cook, did you not?
By the INTERPRETER: I can't get any sense out of it myself.

By Mr. MOORE:

Q. You said you was up there every little while while Jennie w living there at Mary's house?
A. Yes, sir.
98 Q. And you were told up there that Jennie was cookin there for Mary?
A. I was told by a work-hand that she was just to cook ther but Ben Porter himself told me that she was his wife; we live there close and she used to come to our house often.
Q. Do you know whether Ben and Jennie ever went to town t gether or not?
A. I never saw them going to town.
Q. Jennie went to town and stayed a good deal of the time, didn she?
A. I don't know.
Q. Didn't she stay a good deal of the time up at Big Nellie's?

By Mr. LAWSON: We object to that.
By the COURT: I don't think there is any use to go further int that; the proof shows that he is the father of this child.

By Mr. MOORE:

Q. Ben was a small, slim, puny boy at that time wasn't he, Roley
A. He was a healthy good boy.
By Mr. MOORE: That is all.

Re-redirect examination.

By Mr. LAWSON:

Q. Do you know Chas. Wilson one of the defendants in this case
A. Yes, sir.
Q. After you testified at Okmulgee, did Charles Wilson give you any money?
A. He gave me two dollars.

99 Q. When did he give you the two dollars?
A. After I got my subpœna.
Q. And it was the subpœna in this case, was it not?
A. Yes, sir.
Q. At the time he gave you the two dollars he had been talking to you about what you knew in this case, hadn't he?
A. No, sir; he just asked me if I was going and I said "yes" and he handed me two dollars.
Q. Going where?
A. Here to this town.
Q. For what purpose was you coming here?

By the COURT: He was coming here as a witness. There is no use to prove it.

By Mr. LAWSON:

Q. You was summoned as a witness for the plaintiff, wasn't you, and not for Wilson?
A. I don't know, I just got the subpœna.
Q. Have you got the subpœna?
A. It is in the sheriff's office somewhere. I brought it and left it.

By Mr. LAWSON: That is all.

Witness excused.

JOHN GOAT, a witness, produced, sworn and examined on behalf of the Plaintiff, testified, through the Interpreter, as follows, viz:

Direct examination.

By Mr. LAWSON:

Q. What is your name?
A. John Goat.
Q. How old are you, Mr. Goat?
A. About sixty seven.
Q. Are you a member of the Creek tribe?
A. Yes, sir.
100 Q. Where have you lived during your life?
A. I was raised right around in the neighborhood of Little River where it intersects with the South Canadian.
Q. In the Creek Nation?
A. Yes, sir.
Q. Did the Creeks have a custom or usage of marriage between 1890 and 1898 or 1899?
A. Why they didn't have no law at this time, but somewhere along in '82 I think the Council passed an act relative to marriage.
Q. Now, independent of those laws, how did the Indians get married along about 1890?
By the COURT: What was the custom, was a marriage between Indians entered into simply by consent and by agreement and without witnesses considered legal after the Council passed that act fixing the way for them to marry?

A. There was some cases where parties went together and lived together and done well, there was nothing said about it, but where a man was kindy mean and didn't treat his wife right, there was a good deal of talk about it.

By the COURT:

Q. That is not the question. Was it considered legal for them to marry simply by agreement and consent without going through any ceremony and without any witnesses after that Act of the Council was passed?

A. He said where the parties went together and they had children and one of the parents had property, they would recognize the child where the parents would die and let them have some of the property in some cases.

By Mr. LAWSON: That is all.

101 Cross-examination.

By Mr. WALKER:

Q. What was the legislative branches of the Creek Nation called, Judge?

A. Kings and Warriors.

Q. Did you ever serve as a member of either house?

A. Yes, sir; I was a member of the Kings.

Q. Are you familiar with this act of the Creek Council providing that marriages may be solemnized by District Judges——

By Mr. LAWSON: We object as incompetent, irrelevant and immaterial.

By the COURT: Overruled.

By Mr. LAWSON: Plaintiff excepts.

By Mr. WALKER:

Q. By any District Judge, a Minister of the Gospel and in the presence of two or more witnesses, should be valid?

A. Why, I used to be familiar with it, but I am so forgetful that I don't remember all of it now.

Q. Do you know the Creek laws and can you identify the books in which they are written in?

A. Yes, sir.

Q. I hand you, Judge, a book here and see if you can state what it is?

(Handing witness book.)

A. I cannot see to tell what it is.

By the COURT: Can you gentlemen agree that these are the laws of the Creek Nation.

By Mr. WALKER: I guess so.

By Mr. LAWSON: I think so.

102 By Mr. WALKER:

Q. Were you a member of the Creek Council during their session of October, 1881?

By Mr. LAWSON: We object to that; the book itself does not show that it was passed in 1881.

By the WITNESS:

A. No, sir.

By Mr. WALKER:

Q. Were you a member of the Creek Council during its session of 1891?

A. No, sir.

Q. Do you know the object of the passage of this law requiring marriages to be solemnized by District Judges, or Ministers or in the presence of two or more witnesses—that is, why they passed such a law?

A. I was told that the object was to keep people from having two wives or more; it was such a hard matter to establish heirship was the reason the law was passed.

Q. After the passage of this law, in order for a citizen of the Creek Nation to be married so as to have legal heirs as the result of that marriage, was it necessary or not for them to be married by a Judge of the Court, or a Minister of the Gospel or in the presence of two or more witnesses?

By Mr. LAWSON: We object as incompetent, irrelevant and immaterial to the matters in issue.

By the COURT: Overruled.

By Mr. LAWSON: Plaintiff excepts.

103 By Mr. LAWSON: We object for the further reason that it calls for a conclusion.

By the COURT:

Q. Are you a member of the Creek bar, did you practice law in the Creek Nation?

A. No, sir.

Q. Were you ever Judge of the Muskogee tribe?

A. Yes, sir; I served and filled out a short unexpired term.

Q. How long did you serve?

A. About six months.

Q. What sort of court was it you held?

A. District Judge.

By the COURT: Let him answer the question.

By Mr. LAWSON: Plaintiff excepts.

(Question read.)

By the INTERPRETER:

A. He said it was a good law.

By Mr. WALKER:

Q. Wasn't that law passed for the sole purpose of excluding children from inheriting that had been married according to custom and usage of the Creek Nation?

By Mr. LAWSON: Plaintiff objects.
By the COURT: Sustained.
By Mr. WALKER: That is all.

Witness excused.

104 BARNEY TIGER, a witness, produced, sworn and examined on behalf of the Plaintiff, testified, through the Interpreter, as follows, viz:

Direct examination.

By Mr. LAWSON:

Q. What is your name?
A. Barney Tiger. You will have to get an Interpreter.

By the COURT:

Q. What is your name?
A. Barney Tiger.
Q. How old are you?
A. I don't know, over fifty.
Q. Where have you lived during your lifetime?
A. Where lived?
Q. Yes, sir?
A. Right at the town here.
Q. You lived in the Muskogee Nation?
A. Yes, sir.

By Mr. LAWSON: I wish the Court would take the witness, he can ask the witness questions that it would not be proper for me to ask.
By Mr. MOORE: We might tender our side too then.
By the COURT: My mind is made up with reference to the custom from the testimony and from my knowledge of the people; it is impossible to break up by legislation the custom of centuries.

By Mr. LAWSON:

Q. Are you acquainted with the Creek customs and usages and marriages that was extant, in existence in the Creek Nation along about 1895?
A. I cannot understand you.

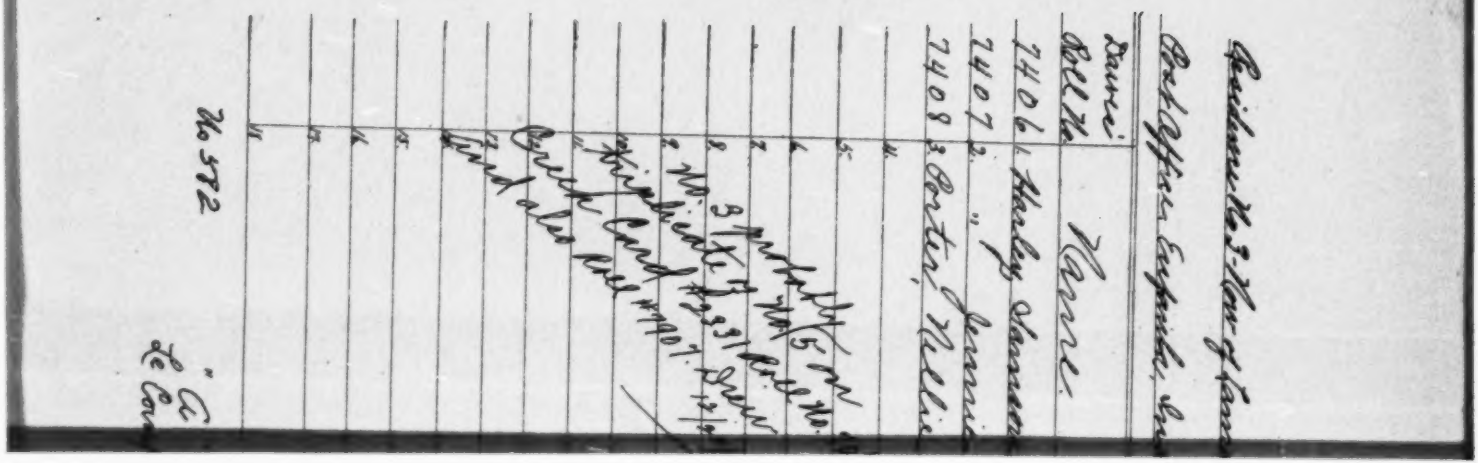
(Here follows Creek Census Card, marked page 105.)

This is to certify that I am the officer having custody of the records pertaining to the enrollment of the members of the Choctaw, Chickasaw, Cherokee, Creek and Seminole Tribes of Indians, and the disposition of the land of said tribes, and that the above and foregoing is a true and correct copy of Creek Indian Census card No. 2466.

Muskogee, Oklahoma,
January 20, 1911.

Thos Ryan
Acting Commissioner to the Five Civilized Tribes.

By W. S. Bynum
Chief Clerk



Tamar, Okla. District
Ind. Ter. Creek Nation Indian Roll. C.H.D. Card No. 2466
Field No. 2489

	Additional to Citizen Full Blood	Age	Sex	Blood	Tribal Enrollment Year	Town	No. Page	Tribal Enrollment of Parents Name of Father	Year	Town	Name of Mother	Year	Town
		25	M	Full	1890	Tullahassochee	208	Hallada	Dead	Tullahassochee	Kiggie	Dead	Tullahassochee
	M	42	F	-	1890	Tulmochmuse	206	Daniel McGilbray	-	Creek Indian	Liggie McGilbra		Tullmochmuse
	Stepdau	5	F	-		"		Ben Porter			No. 2		
	No. 1	on		1895	Authenticated Roll No.			25 Page 208 as Simeon			Citizenship Certificate issued for No. 2 Mar. 22, 1902.		
	" 2	"		1895	" " "			78					
	" 1	"		1895	Pay Roll as Simpson						Citizenship Certificate issued for No. 1 Dec. 14, 1901.		
	5/7/09	Johnson E.			Tiger, now Guardian,			Mutumka, Okla. of No. 3			Citizenship Certificate issued for No. 3 June 27 1902		
	No. 2 on Card 3739 is Child of No. 2.												
	No. 3 transferred from Card 3739												
	Jim Dier has charge of No. 3												

Enrollment of Nos. 7406-7407-7408 hereon approved by the Secretary of Interior March 28 1902

May 16 1901

"A"
Compte

105

106 By the COURT: Mr. Interpreter, go ahead and ask him.

By the WITNESS:

A. Yes, sir.

By Mr. LAWSON:

Q. Under those customs and usages was it competent and proper for the Creeks to go together and live together as man and wife just by mutual agreement?

A. Yes, sir.

Q. Was the children of such marriages deemed legitimate according to the Creek laws and customs?

A. Yes, sir.

By Mr. LAWSON: That is all.

By Mr. WALKER: That is all.

Witness excused.

By Mr. LAWSON: I want next to introduce the roll card of Nellie Porter and ask that the same be filed as evidence in the case and marked plaintiff's "Exhibit Roll Card A."

(Said exhibit was here handed to the Reporter and marked "Exhibit A.")

107 JOHNSON E. TIGER a witness, produced, sworn and examined on behalf of the Plaintiff, testified as follows, viz:

Direct examination.

By Mr. LAWSON:

Q. State your name and age?

A. Johnson Tiger; I am thirty six years old.

Q. What relation are you to Chief Moty Tiger?

A. I am his son.

Q. Are you acquainted with the plaintiff in this case?

A. Yes, sir.

Q. You are guardian for her?

A. Yes, sir.

Q. In the certificate—the roll card just presented—and marked "Exhibit Roll Card," it is there designated that the father of Nellie Porter is Pen Porter, will you please explain the meaning of the word "Pen" and how it happened to be that way according to the custom and usages and so on of the Creeks?

By Mr. WALKER: We object, he has not qualified the witness.

By the COURT: Overruled.

By Mr. WALKER: Defendant excepts.

By the WITNESS:

A. We have no letter "B" in the Creek alphabet. A full-blood Indian in giving the name "Ben Porter" would say to any person by calling the name as "Pen Porter."

Q. Are you acquainted with the Creek custom of marriage along about 1895?

A. Yes, sir.

108 Q. What was the custom, if they had one, Mr. Johnson, if they had one as to marriage, about 1895?

A. They lived together by common consent as man and wife; in most cases that was the custom as to full bloods.

Q. How were the children of such marriages regarded, legitimate or illegitimate?

A. They were considered legitimate of a common consent man and wife.

Q. To what extent did that custom and usage apply in the Creek Nation at that time and before that?

A. It was generally applied in the Creek Nation.

Q. About what per cent, do you suppose, of the marriages of that time was consummated under this custom and usage?

A. Oh, I would say seventy five or eight- per cent.

Q. I will ask you, Mr. Tiger, according to the customs and habits of the Creeks, after they were married, in whose name did the wife go; in the name of the husband or her own name?

A. In most cases the wife usually retained her maiden name; even though the husband had a sir name, the wife usually had just one name. It appears frequently on the Daws Commission rolls now.

Q. Have you had any experience in working up those matters in the Daws Commission?

A. Yes, sir; just last Saturday.

Q. How did you find these names, in the maiden name or in the husband's name?

A. The husband would have his name at the head of the census card, and the wife without the sir name of the husband; I know of specific cases.

Q. Did you know Ben Porter in his lifetime?

A. Yes, sir.

Q. How long did you know him?

A. I think it was during the year 1890 when I went to school with him.

109 Q. When did you next see him?

A. I saw him before he died, possibly 1905 at Wetumka.

Q. Had you been with him from 1890 to 1905?

A. No, sir.

Q. Do you know anything of your own knowledge anything about whether he and Jennie were married?

A. No, sir.

Q. Where is Nellie now?

A. Nellie is here in town.

Q. How old is Nellie?

A. She is about fourteen years old.

By Mr. LAWSON: I believe that is all.

Cross-examination.

By Mr. WALKER:

Q. What degree of blood is your father?
A. Three fourths.
Q. What was your mother's name before she was married?
A. She was a Canard.
Q. Did she change her name to Tiger when she married your father?
A. She is not living.
Q. Isn't it a fact that she went by the name of Tiger when she married your father?
A. I was quite small when she died.
Q. What about your father's present wife?
A. Kizzie Tiger.
Q. What was her name before they were married?
A. I think Lewis.
Q. Your father does not speak the English language?
A. Some.
110 Q. Not very much?
A. No, sir.
Q. When were you married?
A. June 20, 1900.
Q. How?
A. I got a license at Muskogee in the United States Court.
Q. You say about seventy five per cent of the marriages were not solemnized but by just taking up together; do you mean that was the way after the passage of this Creek law?
A. Yes, sir.
Q. Do you know him Jim Alexander was married here?
A. No, sir.
Q. I would like for you to show a few instances around here that was by custom since 1891.
A. Well, I know of Johnson King along about that year; he just simply took up with a school girl.
Q. Don't you think he was violating this Creek statute then?
A. No, sir.
Q. Do you know of any instances where Creek children have inherited where there was any dispute about them not being married according to the Creek laws?
A. Not of my own personal knowledge. I think I have heard some case.
Q. In your opinion wouldn't an objection that was raised to a child being allowed to inherit for the reason that its parents were not married according to the Creek laws, be good?
A. I don't understand your question.
Q. In case a child of a marriage according to usages and customs, since 1891, if it was objected to, would it be entitled to inherit?
A. No, I don't know. I suppose it would be entitled to inherit.
111 Q. Do you know of any case having been tried since that?
A. I don't know of any case now.

Q. Then you don't know whether that is the case or not?
A. Yes, sir.
Q. What do you know it from?
A. From actual knowledge.
Q. Where they were married since 1891 under the custom?
A. Yes, sir; Johnson King just took up with one.
Q. But where the child come up and sought to inherit part of the property, as in this case for instance?
A. There wasn't very much inheritance to it.
Q. Have you in mind a case where a marriage was said to be had according to usage and custom where it was questioned?
A. I don't know of any time when such a thing as that was questioned.
Q. Do you know of a time since '91 where it was followed—that is, a child born of wedlock that was solemnized by usage and custom, do you know of a case—that is, an identical similar case to this in the Creek Nation?
A. I don't know of any case like it that occurred in the Creek Courts.
Q. Then you cannot say that is the custom since the passage of this act, can you?
A. Well, I would say there was no disputes to the issue so as to make one know of a specific instance; they usually inherit the state of the father.
Q. Regardless of how they were married? Can you state an instance in the Creek Courts where they recognized a child as a legitimate heir where its legitimacy was questioned and they were not married according to the Creek statute?
A. I don't know of a specific instance.

By Mr. WALKER: That is all.

112 Redirect examination.

By Mr. LAWSON:

Q. Are you acquainted with the lands in controversy in this suit?
A. Yes, sir.
Q. What, in your opinion, would be a fair valuation of the lands?

By Mr. MOORE: We object as incompetent, irrelevant and immaterial.
By the COURT: Sustained.
By Mr. LAWSON: Plaintiff excepts.

Witness excused.

By Mr. LAWSON: I believe we rest.

By Mr. WALKER: We would like at this time to interpose a demurrer to the testimony.
By Mr. MOORE: The defendants at this time demur to the evidence of the plaintiff in this case and requests the Court to render judgment in favor of the defendants in accordance with the prayer of their answer, for the reason that the testimony of the plaintiffs

in this case does not prove any marriage even under the customs by them relied upon.

By the COURT: The demurrer will be sustained and the decree will be entered for the defendants.

By Mr. LAWSON: If the Court please, I want an exception.

This was all the evidence in this case.

113 And now plaintiff is present in person and by counsel and defendant is present in person and by counsel and defendant files motion to strike amended petition filed herein, and said motion coming on to be heard is argued and submitted to the Court, and is by the Court overruled, to which defendant excepts.

And now defendant files demurrer to amended petition herein and said demurrer coming on to be heard is argued and submitted to the Court and is by the Court overruled, to which defendant excepts.

And now defendant files answer to amended petition herein and the trial of case proceeds.

This cause coming on to be heard on this 24th day of January, 1911, upon the pleadings and upon the evidence offered on the part of the plaintiffs, and upon the plaintiff resting her cause with the Court upon the evidence offered, the defendants demur to the evidence and the Court doth sustain the demurrer thereto, and:

114 The Court finds that the alleged marital relation between Ben Porter and Jennie McGilbra was not established by the proof and did not exist, either by reason of custom or the laws of the Creek Nation; that the relation was illicit; that the plaintiff Nellie Porter was the illegitimate child of this illicit relation.

It is therefore considered, adjudged and decreed by the Court that the Bill of the plaintiff be dismissed; that the title in and to the premises in this controversy contained, being the lands allotted to Ben Porter deceased, be forever quieted in these defendants against this plaintiff and that the defendants have and recover of and from the plaintiff all their costs in this behalf expended for which let execution issue.

MALCOM E. ROSSER,
Special Judge.

Attest:

T. E. NEAL, *Clerk.*

This order styled at beginning as follows, viz:

In the District Court.

582.

NELLIE PORTER, by Next Friend and Guardian, JOHNSON E. TIGER, Plaintiff,
vs.
OLLIE A. WILSON et al., Defendants.

115 In the District Court of Hughes County, State of Oklahoma.

No. 582.

NELLIE PORTER, etc., Plaintiff,
vs.
OLLIE A. WILSON et al., Defendants.

Comes now the above named plaintiff by Johnson E. Tiger her next friend and guardian herein, and moves the Court to set aside an order and decree herein made and entered on the 24th day of January, 1911, in the above styled cause, dismissing the plaintiff's bill therein, etc., and grant her a new trial herein and in said cause for the following reasons:

First. Because the Court erred in sustaining the demurrer of the defendants to the evidence herein adduced and submitted to the Court on the hearing of the cause, on said date, by the plaintiff in the case, in this, that upon a demurrer to evidence admits all the facts which the evidence in the slightest degree tends to prove, and all the inferences or conclusions which — be reasonably and logically drawn from the evidence; and the court cannot weigh conflicting evidence, but will treat the evidence as withdrawn which is most favorable to the demurrer; and where there is any evidence introduced at the trial of the case reasonably tending to establish the allegations of the plaintiff's petition, it is error for the court to sustain a demurrer to such evidence and render judgment in favor of the defendant, etc.

Second. Because the Court erred in finding that the alleged marital relations between Ben Porter and Jennie McGilbra *was* not established by the proof and did not exist, either by reason of the customs or laws of *the laws of* the Creek Nation.

116 Third. Because the Court erred in holding that the relations between said Ben Porter and Jennie McGilbra were illicit, and that the plaintiff, Nellie Porter, was the illegitimate child of this illicit relation.

Fourth. Because the Court erred in decreeing that the Bill of plaintiff be dismissed at her cost; and that the title in and to the premises in this controversy contained, be forever quieted in said defendants against this plaintiff; and that defendants recover of plaintiff all their costs in this behalf expended, etc.

Fifth. Because said order and judgment herein rendered in favor

of defendants and against this plaintiff, is not sustained by sufficient evidence; but is contrary to the evidence herein adduced on behalf of this plaintiff and against said defendants, as shown by the record in the case.

Sixth. Because said order and judgment is contrary to the law; and especially the law governing the decisions of courts on the demurrer to evidence adduced in the case.

Seventh. Because said order and judgment and the said findings of the court as shown in the said order therein, are not sustained by sufficient evidence but are contrary to both the law and the evidence adduced in the case.

Eighth. Because the Court erred in overruling the objections of the plaintiff to the findings of fact set forth in said order and judgment, by said court.

Ninth. Because of the errors of law occurring at the trial, and excepted to by the plaintiff, as shown upon the face of the record in this case.

LEWIS C. LAWSON,
Counsel for Plaintiff.

January 25th, 1911.

117 Endorsed: No. 582. Nellie Porter by Johnson E. Tiger Gdn. next friend. District Court, County of Hughes, State of Oklahoma. Filed Jan. 25, 1911. T. E. Neal, District Clerk, by A. F. Hall, Deputy.

118 # 582.

NELLIE PORTER, by Her Next Friend, JOHNSON E. TIGER, Plaintiff,
vs.
OLLIE A. WILSON et al., Defendants.

And now plaintiff is present by counsel and defendant is present by counsel, and plaintiff files motion for new trial herein which motion is by the Court overruled, to which plaintiff excepts. And now plaintiff prays an appeal to the Supreme Court of the State of Oklahoma, which is by the Court granted and plaintiff is given 90 days in which to make and serve case made, and defendants allowed 15 days thereafter in which to suggest amendments thereto; case to be settled signed and filed within fifteen days thereafter, on five days' notice by either party. Plaintiff required to file petition in error in the Supreme Court of Oklahoma within 130 days.

MALCOM E. ROSSER,
Special Judge.

Attest:
T. E. NEAL, *Clerk.*

119 In the Supreme Court of the State of Oklahoma.

2469.

NELLIE PORTER, by JOHNSON E. TIGER, as Her Guardian and Next Friend, Plaintiff in Error,

vs.

OLLIE A. WILSON, CHARLES W. WILSON, OMER A. GARNER, and W. M. JACKSON, Defendants in Error.

Petition in Error.

(Filed Mar. 27, 1911. W. H. L. Campbell, Clerk.)

Comes now the plaintiff in error, Nellie Porter, by her said next friend and guardian, Johnson E. Tiger, and states that she is a minor under the age of eighteen years; that by and through her said next friend and guardian, she instituted a suit in chancery in the District Court of Hughes County, State of Oklahoma, on the 13th day of July, 1910, against said defendants in error and one R. H. Fitzgerald, to have canceled several deeds unlawfully executed and placed of record, upon and against the South West quarter of Section Ten, Township Thirteen North, Range Thirteen East, containing 40 acres; and the South East Quarter of the North East Quarter of Section Ten, Township Thirteen North, Range Thirteen East; and the South Half of the South Half of the South East quarter of Section Twenty Eight, and the South East quarter of the North West Quarter of Section Thirty Three, Township Nine North, Range Thirteen East, containing 120 acres, by Nannie Broadnax, Sam Porter and Lena Freeman, all of which more clearly appears in the petition therein; that all of said defendants except said Fitzgerald were served with process herein, but said Fitzgerald was not found, page 19; that said deeds were made to and in favor of said Ollie A. Wilson, the wife of said Charles W. Wilson, and to said Charles W. Wilson by said Broadnax, Porter and Freeman, and then said Wilson and wife made said Garner a deed therefor, and afterward said Garner and wife conveyed to said Ollie A. Wilson whereupon she and her husband conveyed an undivided one third interest therein to said Garner and another one third thereof to said Jackson, and all joined in an oil and gas lease thereon to said Fitzgerald.

120 That the said lands were formerly the allotment of one Ben Porter who was a Creek Citizen and duly so enrolled, and were patented to him along about the year 1903; that sometime about the year 1893, 4 or 5, said Ben Porter married one Jennie McGilbra and they lived and cohabited together as husband and wife something like one year and an half or two years thereafter and then separated, and of this marriage and union this plaintiff in error was born and is now about sixteen years old; that said Ben Porter died, intestate, about the 23rd of November, 1906, siesed and posses- of said lands, leaving him surviving said Jennie McGilbra

(who afterward married Washington), this plaintiff in error, an half sister, Nannie Broadnax, Sam Porter an half brother who was a Seminole and so enrolled, and another woman known as Lena Canard or Lena Freeman, she having married William Freeman; and that after the death of said Ben Porter this Sam Porter, Nannie Broadmax and Lena Freeman set up a claim to said lands as the heirs of said decedent, and made and executed said deeds to said Wilson and wife as aforesaid.

Plaintiff in error claims and maintains that her father, Ben Porter and mother Jennie McGilbra were duly and legally married, and that she was the legitimate offspring of said marriage, and, therefore, the sole and only heir at law of said Ben Porter deceased, and as such, entitled to said lands to the entire exclusion of all other persons; while on the other hand the defendants in error claim and maintain that said Sam Porter, Nannie Broadnax and Lena Freeman were the legal heirs and upon their execution of said deeds to said Wilsons, as aforesaid, they conveyed all interest in and to said lands to the defendants in error, in the manner aforesaid.

Plaintiff in error further states that on the 13th day of July, 1910, she instituted her suit to cancel said deeds, page 2, and thereafter the defendants in error filed their answer to the same, page 25-27, to which plaintiff in error replied, page 29; that on the 29th of November, 1910, defendants in error filed their amended answer, pages 34 and 35; whereupon plaintiff in error amended her petition herein, pages 44 to 46, to which defendants in error moved to strike, page 57, and then demurred to this amended petition but both said motion and demurrer were overruled, page 67, whereupon defendants in error filed a second amended answer, pages 61 and 63, to which and said first amended answer, plaintiff in error filed her reply pages 65 and 66; whereas said cause came on for
121 trial, on the 24th day of January, 1911, before Malcom E. Rosser, page 67, as special judge of said court and was, on said date tried by said court; that after plaintiff in error had adduced her evidence in the case, defendants in error demurred to the same "for the reason that the testimony of the plaintiffs in this case does not prove any marriage even under the customs by them relied upon," page 139, and the same was sustained by the court to which plaintiff in error excepted, page 139; and thereupon an order and decree herein was made on said date dismissing this cause at the cost and expense of the plaintiff in error, holding the plaintiff in error to be the illegitimate child of said Ben Porter and Jennie McGilbra, etc., and decreeing the lands to the defendants in error, pages 67 and 68; whereupon the plaintiff in error filed her motion for a new trial herein, on the 25th day of said month page 69, and the same was on said date overruled by the court to which actions and rulings of the court the plaintiff in error duly excepted, page 74 of the Case-Made, which is attached hereto as part hereof.

Plaintiff in error submits that there are error- in the record of this case which should be reviewed and upon consideration thereof the case should be reversed and a decision herein rendered by this court in favor of said plaintiff in error, and against said defendants in error, for the lands in controversy in the case and for her costs

herein expended, cancelling all of said deeds mentioned in the petition herein, upon the following grounds, and for the folowing reasons:

First Assignment.

Because the court erred in sustaining the demurrer of the defendants in error to the evidence herein adduced and submitted to the court on the hearing of this cause by the plaintiff in error;

Second Assignment.

Because the court erred in overruling the motion of the plaintiff in error to set aside said order and decree, so made on the 24th day of January, 1911, whereby said demurrer to said evidence was sustained and the said lands decreed to said defendants in error, etc., which said motion is hereby referred to, and each and every ground of error therein made and specified, is hereby asked to be read and considered herewith as distinct grounds under this assignment of error, as fully as if again set out in hæc verba herein;

122 Third Assignment.

Because the court erred in finding that "the alleged marital relation between Ben Porter and Jennie McGilbra was not established by the proof and did not exist; either by reason of custom or law of the Creek Nation; that the relation was illicit; that Nellie Porter was the illicit child of this illicit relation;"

Fourth Assignment.

Because the court erred in decreeing and adjudging "that the bill be dismissed; that the title in and to the premises in this controversy contained, being the lands allotted to Ben Porter deceased, be forever quieted in these defendants (in error) against this plaintiff (in error); and that the defendants have and recover of and from the plaintiff (in error) all their costs in this behalf expended;"

Fifth Assignment.

Because said order and decree is not sustained by sufficient evidence but is contrary to both the law and the evidence therein adduced before the trial court, and now found in the record of the case;

Sixth Assignment.

Because the court erred in predicating and basing said decree and judgment alone upon the custom and laws "of the Creek Nation;" whereas the evidence herein adduced fully and completely established a good and valid Common Law marriage between Ben Porter and Jennie McGilbra as of the time of said marriage, and thereby legi-amized not only said marriage but likewise the paternity and statute of the plaintiff in error, and thus legally made her the sole

and only heir at law of her said father, the said Ben Porter, and entitled to the lands in controversy;

Seventh Assignment.

Because of the numerous errors occurring at the trial, and duly excepted to by the plaintiff in error, as shown by the record in the case.

For the reasons and assignments aforesaid, plaintiff in error submits that the judgment and decree of the district court of said Hughes County, is erroneous, and prays that the same be reviewed by this court and that the same be reversed and a decision herein be rendered in favor of this plaintiff in error decreeing her the lands in controversy and canceling said deeds thereon and for her costs herein expended, etc.

Respectfully Submitted,

LEWIS C. LAWSON,
Counsel for Plaintiff in Error.

March 4th, 1911.

123 And thereafter to-wit, on the 11th day of February, 1913, in the Supreme Court of Oklahoma, the following proceedings were had in said cause:

Supreme Court, December Term, 1912, February 11th, 1913,
Twenty-First Judicial Day.

No. 2469.

NELLIE PORTER, by JOHNSON E. TIGER, Gdn., Plaintiff in Error,
vs.
OLLIE A. WILSON et al., Defendants in Error.

And now this cause comes on for final decision and determination by the court upon the record and briefs filed herein,

And the court having considered the same finds that the judgment of the trial court in the above cause should be affirmed. Opinion by Sharp, C.

By the COURT: It is so ordered, the above opinion is hereby adopted in whole, and judgment is entered accordingly.

124 (Filed Feb. 11, 1913. W. H. L. Campbell, Clerk. Withdrawn, Corrected and Refiled Oct. 21, 1913.)

In the Supreme Court of the State of Oklahoma, Supreme Court Commission, Division Number One.

No. 2469.

NELLIE PORTER, by JOHNSON E. TIGER, as Her Guardian and Next Friend, Plaintiff in Error,

v.

OLLIE A. WILSON, CHAS. W. WILSON, OMER A. GARNER, and W. W. JACKSON, Defendants in Error.

Syllabus.

1. In the trial of a law action all of the issues, both of fact and law, were submitted to the court without the intervention of a jury. At the conclusion of plaintiff's testimony, and after she had rested her case, defendants demurred to the evidence, and at the same time requested the court to render judgment in their favor as prayed for in their answer, in which affirmative relief was asked. The court sustained the demurrer, made special findings of fact, and rendered a decree in favor of the defendants. Held, that while the judgment of the court sustained the demurrer, yet having made special findings of fact, it was obvious that the court weighed the plaintiff's testimony for the purpose of determining the rights of the respective parties, and the whole case being before the court, and there being evidence reasonably tending to support the court's findings, no reversible error was committed.
2. When a trial is had before the court without a jury, the court must eventually weigh the testimony for the purpose of determining where the preponderance is, and there is no reason why it should not do so at the earliest possible time, when the rights of the plaintiff will not be cut off or impaired by its so doing; and when the plaintiff has introduced all her proof, and rested, no right of hers will be impaired if the court then determines what has been proven.
3. This court is required by statute to disregard any error or defect in the pleadings or proceedings which does not affect the substantial rights of the adverse party.
4. Sec. 5 of the act of Congress of February 28th, 1891 (26 Stat. at L. 794), which provides: "That for the purpose of determining the descent of land to the heirs of any deceased Indian, under the provisions of said act (Act of February 8th, 1887, chap. 119, 24 Stat. at L. 388), whenever any male and female Indian shall have cohabited together as husband and wife, according to the custom and manner of Indian life, the issue of such cohabitation shall be, for the purpose aforesaid, taken

and deemed to be the legitimate issue of the Indians so living together, and every Indian child, otherwise illegitimate, shall for such purposes be taken and deemed to be the legitimate issue of the father of such child," was not extended in its operation to the territory occupied by the Creek Indians in the Indian Territory.

125 Error from the District Court of Hughes County.

Malcolm E. Rosser, Judge.

Action by Nellie Porter, by Johnson E. Tiger, as Her Guardian and Next Friend, against Ollie A. Wilson, Charles W. Wilson, Omer A. Garner, and W. W. Jackson. From a judgment in favor of defendants, plaintiff prosecutes error. Affirmed.

Lewis C. Lawson, for plaintiff in error. Moore & Noble, and Walker & Fancher, for defendants in error.

SHARP, *C.:*

In the trial below all issues, both of fact and of law, were submitted to the court without the intervention of a jury. At the conclusion of plaintiff's testimony, and after she had rested her case, defendants' counsel demurred to the evidence and requested the court to render judgment in defendants' favor, in accordance with the prayer of their answer, assigning as a reason therefor, that the testimony of the plaintiff failed to prove a marriage of plaintiff's mother and father, according to the customs and usages of the Creek tribe of Indians. The demurrer was sustained, special findings of fact submitted by the court, and a decree entered for the defendants. In the special findings the court found that the marital relation alleged to have existed between Ben Porter and Jennie McGilbra, plaintiff's parents, was not established by the testimony, and did not in fact exist, either by reason of the customs or the laws of the Creek Nation, but instead, that the relation, once existing between them, was illicit, and that the plaintiff was the offspring of said meretricious relationship.

It is insisted by counsel for plaintiff in error that the court erred in sustaining the demurrer, as there was evidence introduced at the trial reasonably tending to establish the allegations of plain-
126 tiff's petition; that a demurrer admits all the facts which the evidence in the slightest degree tends to prove, and all the inferences or conclusions which may be reasonably and logically drawn from the evidence. This, in proper cases, is not only the rule in this state, but we believe to be the very general rule of all the courts. Upon a demurrer to the evidence, the court must consider as true every portion of the evidence tending to prove the case of the party resisting the demurrer, and cannot weigh conflicting evidence. Conklin v. Yates, 16 Okl. 266, 83 Pac. 910; Edmisson v. Drumm-Flato Comm. Co., 13 Okla. 440, 73 Pac. 958; Cole v. Missouri,

K. & O. R. Co., 20 Okl. 227, 94 Pac. 540; Ziska v. Ziska et al., id. 634, 95 Pac. 254.

In Conklin v. Yates et al., and Ziska v. Ziska et al., the trial in both cases was had before the court, but the effect of a demurrer to the evidence in trials before the court does not appear to have been raised or considered, although the same general rule was observed as in jury trials. The statutory warrant for demurring to the testimony of the party on whom rests the burden of the issues is found in the third paragraph of sec. 5794, Comp. Laws 1909, which expressly provides for the order of procedure in jury trials. This provision was held, in Chicago Lumber Co. v. Merrimack River Sav. Bank, 52 Kan. 410, 34 Pac. 1045, to be authorized by the spirit, if not the letter, of the code of procedure of that state (sec. 275 (4722) Stats. Kans. 1901), and which provision of the statute is identical with sec. 5794, supra. This practice appears to have been recognized by the Supreme Court of Kansas in a number of cases, among which are: Wolf v. Washer, 32 Kan. 533, 4 Pac. 1036; Farnsworth v. Clarke, 62 Kan. 264, 62 Pac. 655; Wehe et al. v. Mood et al., 68 Kan. 373, 75 Pac. 476. The nature of a demurrer to the evidence has been defined to be (2 Tid. Pr. p. 265): "A proceedings by which the judges of the court in which the action is depending are
127 called upon to declare what the law is, upon the facts shown in evidence, analagous to the demurrer upon the facts alleged in a pleading." See also, Suydam v. Williamson et al., 20 Wall. 427, 15 L. Ed. 978. And the practice of demurring to the evidence in jury trials, while not recognized in some jurisdictions, is an ancient and well established one, having a firm support in principle, and recognized in many of the states, and by the federal and English courts (Elliott's General Practice, secs. 855, 856); though in trials before the court, the practice of demurring to the evidence appears to be an anomalous procedure, followed only by the Supreme Court of Kansas, so far as our investigation of the authorities extends. (30 Cyc. 1946; footnote to Elliott's General Practice, sec. 855).

Where the trial is before the court, it is charged with the duty of determining the facts, while where the trial is before the jury, the facts are for its determination, it being the province of the court to declare the law. We must not, however, overlook the very important fact that the court did not render its judgment alone upon the demurrer to the evidence, but after a consideration of the proof submitted by plaintiff, made its findings of fact, thereby necessarily weighing the plaintiff's testimony for the purpose of determining the rights of the respective parties to a recovery. A similar question was before the supreme court of Washington in Lambuth v. Stetson & Post Mill Co., 14 Wash. 187, 44 Pac. 148, and from which we quote at length. It was said by Hoyt, C. J., speaking for the court:

"The cause went to trial before the court, a jury having been waived by the parties. After plaintiff had put in his evidence and rested, defendant moved for non-suit and a dismissal of the action, on the ground that the evidence had not shown that plaintiff was entitled to recover. This motion was granted, for the reason, as stated by the court, that a fair preponderance of the proof established

facts which prevented a recovery by the plaintiff. The granting of this motion, followed by a dismissal of the action, is the ground upon which plaintiff relies for a reversal.

128 If the court had a right to weigh the evidence tending to establish the facts alleged in the answer against that which tended to make out plaintiff's prima facie case, and decide in accordance with what he thought to be the preponderance of the evidence on either side, the judgment must be affirmed; for, if he had a right to do this, his conclusion has the force here of the verdict of a jury, and will not be disturbed if there was evidence upon which it could be founded. Could the court thus weigh the testimony for and against the claim of plaintiff upon this motion for a nonsuit, or must it be denied if there was any evidence tending to sustain the claim of plaintiff, however, much there might be in opposition thereto? Appellant has cited a large number of cases to show that a motion for nonsuit should be denied if the evidence introduced by the plaintiff tended to establish the facts necessary to a recovery; but all but one stated the rule in cases in which the cause was tried before a jury. * * * But, where the entire trial is before the court which must finally pass upon the law and facts of the case, there is no good reason why it should not be allowed to determine the facts necessary to a proper application of the law at any time during the trial. It would be worse than useless for the court, after its attention had been called to the insufficiency of the evidence offered by the plaintiff to establish the facts necessary to enable him to recover, and after being satisfied that such was the nature of the evidence introduced by the plaintiff, to require the defendant to put in evidence to disprove that which had been already sufficiently disproved. When the trial is before a jury, the court cannot weigh the testimony upon a motion for a nonsuit, for the reason that it cannot weigh it at any time; but, when the trial is without a jury, the court must eventually weigh the testimony for the purpose of determining where the preponderance is, and there is no reason why it should not so weigh it at the earliest possible time, when the rights of the plaintiff will not be cut off by its so doing; and when the plaintiff has introduced all of his proof, and rested, no right of his will be cut off if the court then determines what has been proven. It cannot be presumed that plaintiff's case will be strengthened by the evidence put in by the defendant. If, when plaintiff had submitted his evidence, the defendant had rested without putting in any proof, it is clear that the court would have had to determine the questions of fact made by the pleadings upon a preponderance of the testimony. Hence, under the contended for by the appellant, the court might be put in a ridiculous position of denying the motion for a nonsuit, and immediately thereafter, upon the refusal of the defendant to put in any proof, deciding the case in his favor. No good purpose could be subserved by refusing to a trial court the right to determine the law in the light of the evidence upon a motion for a nonsuit, the same as upon final submission. It was the right of the court, upon the motion for a nonsuit, to decide as to the preponderance of the evi-

dence; and it having decided that such preponderance was with the defendant, and there having been testimony to support such finding, the judgment rendered thereon must be affirmed."

The legal effect of a motion for a nonsuit, made by the opposing party after his adversary has closed his case, is the same as that of a demurrer to the evidence. Thompson on Trials, secs. 1667, 2267, 2268; Sutherland Code Pleading and Practice, sec. 1686.

129 In Neuberger v. Keim, 134 N. Y. 35, after the plaintiffs had rested their case, counsel for defendant moved to dismiss the complaint on the ground that plaintiffs had failed to prove facts sufficient to constitute a cause of action. The court replied: "I will not dismiss the complaint, but I say, upon the evidence as it now stands, I would not feel justified in finding that this conveyance in question was made with the intention of defrauding creditors."

The opinion reads:

"Both parties prepared findings and submitted them to the court. The complaint was dismissed upon the merits. It appears to us that, under these circumstances, the case must be deemed to have been submitted to the court in such a way as to permit it to weigh the evidence, draw the legitimate inferences therefrom and determine the facts. The trial, as we have seen, was before the court, which was charged with the duty of determining the facts. It is quite different in a trial before a jury. In such a case it is the province of the court to declare the law, and that of the jury to determine the facts. We do not regard it as necessary that a court charged with the duty of deciding the facts should be required to continue its sittings and take evidence that the defendant may be able to produce when its mind is satisfied upon the close of the plaintiff's case that, under the facts disclosed, the plaintiff ought not to recover."

The principle thus applied was followed in Bliven v. Robinson, 152 N. Y. 333, where, after quoting at length from the former opinion of the court, it was said:

"In this case, as in the one cited, the facts were to be determined by the court. At the close of plaintiff's evidence, it was satisfied that plaintiff ought not to succeed, and subsequently, at the request of the parties, had passed upon every question of fact and considered every question of law involved in the case, or submitted to it for its determination."

It was held that the decision was sustained by the evidence, and that the court properly refused to amend the judgment and decision by striking out the words: "Upon the merits."

In Hayward, Adm'r, v. Jackman, 96 Ia. 77, 64 N. W. 667, the trial was before the court, and at the close of the introduction of the evidence in behalf of plaintiff, the defendant moved the court to dismiss the case, or enter judgment for the defendant. The motion was sustained, and judgment was entered accordingly. It was observed by the court in its opinion:

130 "Counsel for appellant contend that the motion to dismiss or for judgment ought to have been overruled, because

it is in the nature of a demurrer to the evidence, and it ought not to have been sustained unless the evidence was insufficient to support a verdict if the case had been tried by jury. We think the rule applicable to a trial by jury does not obtain where there is a trial of a law action by the court. In such a trial the court weighs the facts, and determines them by a preponderance of the evidence; and when plaintiff's evidence was all introduced, and the defendant offered no evidence, the question for the court to determine was whether, by a preponderance of the evidence, the plaintiff was entitled to a judgment."

The judgment of the district court was affirmed.

Powell v. Canaday, 65 Mo. App. 713, 69 S. W. 686, was a suit in equity. After plaintiff had introduced his testimony, the defendant submitted a demurrer to the evidence, which was sustained by the court. Thereupon was entered the following judgment or order:

"It is therefore considered and adjudged by the court that the writ of injunction herein be dissolved; that the defendant be released from the operations and restrictions thereof, and go hence without day. It is further considered and adjudged that the defendant recover of the plaintiff the costs and charges herein expended, and that he have execution therefor."

It was said by the court:

"Although a demurrer to the evidence is not strictly applicable to a proceeding in equity, it may be treated as a practical mode of arriving at the view of the trial judge in a proceeding of this kind. At the close of plaintiff's testimony, the learned judge announced as his opinion that plaintiff had no case in equity. We see no reason why he might not so declare, and thereby save public time, and the annoyance of unnecessary proceedings. This the learned trial judge did. There was no substantial error in his procedure in so doing."

It is obvious, from the record, that the court passed upon the entire case. Where it appears, as in this case, that the court weighed the evidence, and determined plaintiff's right to recover after a consideration of the proofs offered, it would be too subtle a refinement to say that the court should have overruled the demurrer, and thereupon, on the same evidence, have found for the defendant; otherwise a reversal must follow. It certainly cannot be presumed that if the demurrer to the evidence had not been offered, that the court would have reached a different conclusion on the same evidence, nor is it to be presumed that the defendants, if they
131 had offered testimony, would thereby have strengthened and fortified plaintiff's claim. Ultimately plaintiff's right to recover involved a question of fact for the court's determination. That the court did consider the testimony and determine the insufficiency is clearly established from the language of the journal entry. The burden of proof rested upon the plaintiff to prove, not only the Indian customs of the Creek Nation pertaining to marriage, but to establish her rights thereunder. There was more or less conflict in the testimony of plaintiff's witnesses, from which different conclu-

sions might be drawn, and there being testimony reasonably tending to support the judgment of the court, the same will not be weighed by this court to ascertain whether the court's decision is against the preponderance of the testimony. McCann v. McCann et al., 24 Okl. 264, 103 Pac. 694; Seward v. Casler et al., 24 Okl. 275, 103 Pac. 275; J. I. Case Threshing Mach. Co. v. Oates, 27 Okl. 412, 112 Pac. 980; In re Byrd, 31 Okl. 549, 122 Pac. 516; Hanson v. Parker, 31 Okl. 399, 121 Pac. 1063.

Even though it were conceded that technical error was committed, the substantial rights of the plaintiff were not affected, as she had introduced her evidence and rested her case, she was not caused to change her position, nor did she suffer any disadvantage in the procedure adopted. It is incumbent upon this court, in every stage of the action, to disregard any error or defect in the pleading or proceedings which does not affect the substantial rights of the adverse party; and no judgment will be reversed or affected by reason of such error or defect. Comp. Laws 1909, sec. 5680; Mullen v. Thaxton, 24 Okl. 643, 104 Pac. 359; St. Louis & S. F. Ry. Co. v. Houston, 27 Okl. 719, 117 Pac. 184; City of Pawhuska v. Rush, 29 Okl. 759, 119 Pac. 239.

132 Finally, it is urged that even though Nellie Porter was the illegitimate child of Ben Porter and Jennie McGilbra, she would be the lawful heir of the former by virtue of sec. 5 of the act of Congress of February 28th, 1901 (26 Stat. at L. 794). This act is amendatory of, and further extends the provisions of, the general allotment act of February 8th, 1887 (24 Stat. at L. 388), which, in sec. 8, by express terms does not include the territory then occupied by the Creeks in the Indian Territory. Sec. 5 of the former act expressly provides that its provisions shall not be held or construed as to apply to the lands commonly called and known as the "Cherokee Outlet." But in no wise does said latter act extend its provisions to the territory occupied by the Creeks, who, as we have seen, were expressly reserved from its operation by the act of February 8th, 1887. This act, as to the territory named in sec. 8 thereof, was therefore not affected by the passage of the latter statute; hence that provision of said statute, conferring upon an illegitimate child the right to inherit from the father, was without effect upon the right of inheritance, as to the Creek Indians in the Indian Territory.

The judgment of the trial court should be affirmed.

Feb. 11-1913—By the Court—Adopted in whole.

133 In the Supreme Court of the State of Oklahoma.

And thereafter on the 24th day of February, 1913, a Petition for Rehearing was filed by Plaintiff in Error in this cause.

134 And thereafter to-wit, on the 21st day of October, 1913, in the Supreme Court of Oklahoma, the following proceedings were had in said cause:

Supreme Court, September Term, 1913, October 21st, 1913, Eighteenth Judicial Day.

No. 2469.

NELLIE PORTER, etc., Plaintiff in Error,
vs.
OLLIE A. WILSON et al., Defendants in Error.

And now on this day the above opinion is hereby withdrawn for correction, the same is corrected, and the opinion of the court in the above cause as so corrected is hereby refiled, and the petition for rehearing is hereby denied.

135 In the Supreme Court of the State of Oklahoma.

I, W. H. L. Campbell, Clerk of the Supreme Court of the State of Oklahoma, do hereby certify that the foregoing 134 pages, numbered from 1 to 134, both inclusive, are a full, true and complete copy of the præcipe for parts of record, Order appointing Jas. A. Long to serve citation, Order allowing Writ and fixing Bond, Supersedeas Bond, Petition of Plaintiff, Answer of Defendants, Reply, Amended petition of Plaintiff, Answer of Defendants, Reply, Demurrer, Evidence taken in the trial, Judgment, Motion for new trial, Order overruling motion, Petition in Error to the Supreme Court, Journal Entry affirming cause, Opinion of the Court, Order overruling petition for rehearing and the original Citation and service thereof, Petition for Writ of Error, Assignments of Error, and the Writ of Error, in case #2469, Nellie Porter, etc., Plaintiff in Error vs. Ollie A. Wilson, et al., Defendants in Error, as the same remain on file and of record in my office.

I further certify that the Defendant in Error has filed no suggestions as to parts of the record for this transcript.

In Witness Whereof, I hereunto set my hand and affix the seal of said court at Oklahoma City, this the 31st day of December, 1913.

[Seal Supreme Court, State of Oklahoma.]

W. H. L. CAMPBELL, *Clerk*,
By JESSIE PARDOE, *Deputy*.

Endorsed on cover: File No. 24,023. Oklahoma Supreme Court. Term No. 342. Nellie Porter, plaintiff in error, vs. Ollie A. Wilson, Charles W. Wilson, Omer A. Garner, and W. M. Jackson. Filed January 21st, 1914. File No. 24,023.

FILED
MAR 15 1916
JAMES D. MAHER
CLERK

No. 38

In the

Supreme Court of the United States.

October Term, 1916.

NELLIE PORTER, - - *Plaintiff in Error,*

vs.

OLLIE A. WILSON, CHARLES W. WILSON, OMER A. GARNER AND W. M. JACKSON,

Defendants in Error.

IN ERROR TO THE SUPREME COURT OF THE STATE OF OKLAHOMA.

BRIEF FOR PLAINTIFF IN ERROR.

LEWIS C. LAWSON,
Counsel for Plaintiff in Error.

FRANK L. MONTGOMERY,
U. S. Probate Attorney.

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In the

SUPREME COURT OF THE UNITED STATES.

October Term, 1914.

No. 342.

NELLIE PORTER, - - *Plaintiff in Error,*

vs.

OLLIE A. WILSON, CHARLES W. WILSON, OMER A. GARNER AND W. M. JACKSON,

Defendants in Error.

IN ERROR TO THE SUPREME COURT OF THE STATE OF OKLAHOMA.

BRIEF *for* PLAINTIFF *in* ERROR.

Statement of the Case.

This was a suit brought by the plaintiff in error, Nellie Porter, by Johnson E. Tiger, as her next friend and guardian, in the District Court of Hughes County, State of Oklahoma, on the 13th day of July, 1910, against said defendants in error and one R. H. Fitzgerald, to have cancelled several deeds unlawfully executed and placed of record, upon and

against the Southwest Quarter of the Northeast Quarter of Section Ten, Township Thirteen North, Range Thirteen East, containing 40 acres; and the Southeast Quarter of the Northeast Quarter of Section Ten, Township Thirteen North, Range Thirteen East; and the South Half of the South Half of the Southeast Quarter of the Northwest Quarter of Section Thirty-three, Township Nine North, Range Thirteen East, containing 120 acres, by Nannie Broadnax, Sam Porter and Lena Freeman, all of which more clearly appears in the petition therein; that all of said defendants except said Fitzgerald were served with process herein, but said Fitzgerald was not found ( ); that said deeds were made to and in favor of said Ollie A. Wilson, the wife of said Charles W. Wilson, and to said Charles W. Wilson by said Broadnax, Porter and Freeman, and then said Wilson and wife made said Garner a deed therefor, and afterward said Garner and wife conveyed to said Ollie A. Wilson, whereupon she and her husband conveyed an undivided one-third interest therein to said Garner and another one-third thereof to said Jackson, and all joined in an oil and gas lease thereon to said Fitzgerald.

That the said lands were formerly the allotment of one Ben Porter, who was a Creek citizen and duly so enrolled, and were patented to him along about the year 1903; that some time about the year 1893, '4 or '5, said Ben Porter married one Jennie McGilbra, and they lived and cohabited to-

gether as husband and wife something like one year and a half or two years thereafter, and then separated, and of this marriage and union this plaintiff in error was born; that said Ben Porter died, intestate, about the 23rd of November, 1906, seized and possessed of said lands, leaving surviving him said Jennie McGilbra (who afterward married Washington); this plaintiff in error; an half sister, Nannie Broadnax; Sam Porter, an half brother, who was a Seminole, and so enrolled; and another woman known as Lena Canard or Lena Freeman, she having married William Freeman; and that after the death of said Ben Porter, this Sam Porter, Nannie Broadnax and Lena Freeman set up a claim to said lands as the heirs of said descedent, and made and executed said deeds to said Wilson and wife as aforesaid.

Plaintiff in error claims and maintains that her father, Ben Porter, and mother, Jennie McGilbra, were duly and legally married, and that she was the legitimate offspring of said marriage, and, therefore the sole and only heir at law of said Ben Porter, deceased, and, as such, entitled to said lands to the entire exclusion of all other persons; while on the other hand the defendants in error claim and maintain that said Sam Porter, Nannie Broadnax and Lena Freeman were the legal heirs, and upon their execution of said deeds to said Wilsons, as aforesaid, they conveyed all interest in and to said lands to the defendants in error in the manner aforesaid.

Plaintiff in error further states that on the 13th day of July, 1910, she instituted her suit to cancel said deeds (p. 20), and thereafter the defendants filed their answer to the same (pp. 24-25), to which plaintiff in error replied (p. 26); that on the 29th of November, 1910, defendants in error filed their amended answer (pp. 28-29); whereupon plaintiff in error amended her petition herein (pp. 26-27); to which defendants in error moved to strike and demurred to the amended petition of plaintiff in error (p. 30); and to which answer of the defendants in error to the amended petition of the plaintiff in error, plaintiff in error replied pp. (29-30)

The cause then came on for trial on the 24th day of January, 1911, and was tried by the court; that after the plaintiff in error had adduced her evidence in the case, defendants in error demurred to the same "for the reason that the testimony of the plaintiff in this case does not prove any marriage even under the customs by them relied upon" (pp. 70 and 71), and the same was sustained by the court, to which plaintiff in error excepted (p. 71); and thereupon an order and decree therein was made on said date dismissing this cause at the cost and expense of the plaintiff in error, holding the plaintiff in error to be the illegitimate child of said Ben Porter and Jennie McGilbra, etc., and decreeing the lands to the defendants in error (p. 71); whereupon the plaintiff in error filed her motion for a new trial herein, on the 25th day of said month (pp. 72 and

73), and the same was on said date overruled by the court, to which actions and rulings of the court the plaintiff in error duly excepted (p. 73); from the decision of said court an appeal was taken to the Supreme Court of said State on the 27th day of March, 1911, and a decision had therein by said Supreme Court on the 11th day of February, 1913, and corrected and re-filed on the 21st of October, 1913, whereby the decision of said District Court was affirmed, as shown on pages 78 to 84, inclusive. Plaintiff in error filed her petition before said Supreme Court for a rehearing and the same was overruled and denied (p. 85), whereupon a writ of error was sued out from this court from said judgment and decree of said Supreme Court of the State of Oklahoma, as shown by the record in this case.

In other words, plaintiff in error maintains that she is the legitimate child of Ben Porter and Jennie McGilbra, who were married according to the usages and customs of the Creek Tribe of Indians about the year 1893, the exact date of such marriage not being shown; that her said father and mother lived and cohabited together as husband and wife about a year or a year and a half or two years, according to such usages and customs; and that of this marriage or cohabitation the plaintiff in error was born and is the only child of said Ben Porter; that said father and mother were members of the Creek Tribe, and an allotment was made to the said Ben Porter, described in the record in this case, and was seized and

possessed of said allotment at the time of his death in November, 1906; that, as shown by the testimony taken in the record in this case, the said Ben Porter at various times in his life time recognized and claimed the plaintiff in error as his child, and thereby the plaintiff in error became the heir at law of her said father under the Creek laws of descent and distribution of the Creek Nation, and Chapter 49 of the Statute of Arkansas, put in force in the Creek Nation at various times by Acts of Congress, and especially as provided in section 6 of the Creek Supplemental Treaty or Agreement, approved by Congress on the 30th day of June, 1902, and which became fully effective in the Creek Nation on the 8th of August, 1902, and by another Act of Congress approved on the 28th of April, 1904, whereby all the Statutes of Arkansas theretofore put in force in Indian Territory were again reinstated and continued and made applicable to all persons and estates, whether Indian, freedman or otherwise, then living and residing in said Indian Territory.

Jurisdiction.

And the plaintiff in error also contends and maintains that she is the sole and only heir at law of her deceased father, Ben Porter, and as such heir inherited the lands in controversy, whether she be legitimate or illegitimate, as the decree of said District Court found and so held that she was the illegitimate child of said Ben Porter and Jennie McGil-

bra; and that judgment or decree was affirmed by the Supreme Court of said State; and as to the law in such matters, in addition to that above referred to, plaintiff in error now refers to the Act of Congress of February 8th, 1887, Chapter 119, 24 Stat. at L. 388, and February 28th, 1891, 26 Stat. at L. 794, and especially section 5 thereof, referred to, considered and construed in the opinion of the Supreme Court of said state, and in point 4 of the syllabus of said decision, and likewise section 258 of the Constitution and Laws of the Muskogee Nation (1893) by A. P. McKellop, which is as follows:

> "*Sec. 258.* If any person claim to be the child of a deceased male person, and it should be proven that such person did not, during life, recognize the claimant as his offspring, then such claimant shall not be entitled to any share in the estate of the deceased."

And section 1 of article 2 of the Constitution and Laws of the Muskogee Nation (1891) by L. C. Perryman, which is as follows:

> "*Section 1.* Should any person or persons appear claiming to be the child or children of any deceased male citizen of this nation, should it be proved that such deceased citizen did not during life recognize such person or persons as offspring, then such persons shall not be entitled to any share in the estate of the deceased."

Plaintiff in error here calls the attention of the court to the fact that said section 258 and section 1 of said article 2 of said Creek laws of descent above

referred to, are nowhere directly passed upon and specifically pointed out in said judgment or decisions of said courts; but the same were pleaded by the plaintiff in error in her petition filed in said District Court wherein she alleges:

> "That said Ben Porter and Jennie McGilbra were married to each other about the year One Thousand Eight Hundred and Ninety Three (1893) and thereafter lived and resided together as man and wife about one and one-half years; that of said marriage the plaintiff, Nellie Porter, was born and was always recognized by said Porter thereafter as his legitimate child," etc.,

as shown on page 21 of the record; and also in her amended petition, where she again alleges among other things, "that from and ever after said marriage said Porter and McGilbra lived, resided together and cohabited with each other, as husband and wife, in accordance with, and in compliance to said usages and customs of said nation, for and during the time so mentioned in said original petition; and of said marriage and cohabitation, aforesaid, by and between said Ben Porter and said Jennie McGilbra, the said plaintiff herein, Nellie Porter, was born to said Ben Porter and Jennie McGilbra; that ever after the birth of said plaintiff, the said Porter and McGilbra acknowledged and recognized this plaintiff as their lawful and legitimate child and offspring of said marriage," etc.; and said allegation that said Porter recognized and acknowledged

the plaintiff in error as his child is nowhere denied in the answer of the defendants in error. So that allegation was thus established, not only by the pleadings, but likewise by the testimony of various witnesses adduced in the case, who testify to this fact and the acknowledgment and recognition of the plaintiff in error by the said Ben Porter, as his child and offspring.

But, as said state courts denied the plaintiff in error all right and interest in said lands and held that she was an illegitimate child of Ben Porter said courts of necessity passed upon the force and effect of said sections of said Creek law, and denied to this plaintiff in error their legal force and effect by depriving her of said lands; and thereby and for that reason this court has jurisdiction to pass upon said respective sections, arising out of said Creek laws as well as said Chapter 49 of the Statutes of Arkansas, put in force in the Indian Territory by said Acts of Congress.

SPECIFICATION OF ERRORS RELIED UPON.

The errors of said state courts relied upon by the plaintiff in error in this case, are as follows:

First.

That the said Supreme Court erred in holding that section 5 of the Act of Congress of February 28, 1891 (26 Stat. at L. 794, c. 383), which provides: "That for the purpose of determining the descent of land to the heirs of any deceased Indian, under the provisions of said act (Act Feb. 8, 1887, 24 Stat. at L. 388, c. 119), whenever any male and female Indian shall have cohabitated together as husband and wife, according to the custom and manner of Indian life, the issue of such cohabitation shall be, for all the purposes aforesaid, taken and deemed to be legitimate issue of the Indians so living together, and every Indian child, otherwise illegitimate, shall for such purposes be taken and held to be the legitimate issue of the father of such child," was not extended in its operations to the territory occupied by the Creek Indians in the Indian Territory.

Second.

That the court erred in holding that, on the demurrer to the evidence interposed by the said defendants in error, the court could, and did, weigh the conflicting evidence in the case, and find the facts

in the case and determine the rights of the parties hereto in said case, and there being evidence reasonably tending to support the court's findings, no reversible error was committed; that said demurrer to the evidence adduced in the case by the plaintiff in error presented to said court a proposition of law, and not of fact; to convey or transform said proposition of law thereby presented on said demurrer to said evidence, into a matter of fact, or to find the facts in said case thereon and render final judgment in said case against the plaintiff in error and in favor of said defendants in error, and thereby deprive and deny the plaintiff in error of her right, title and interest in and to said lands and quiet the title thereto in said defendants in error; that the action of said court in so rendering said judgment in said case and finding the facts therein against the plaintiff in error and in favor of said defendants in error, on said demurrer to the evidence of the plaintiff in error, is repugnant to, and in violation of the seventh section of article two of the Constitution of said State of Oklahoma, wherein it is provided that no person shall be deprived of life, liberty or property without due process of law; and the same is likewise repugnant to, and in violation of the 14th Amendment to the Constitution of the United States wherein it is provided: "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of

life, liberty or property, without due process of law, nor deny any person within its jurisdiction the equal protection of the laws;" that section 5039 of the Revised Laws of the State of Oklahoma, provides: "The provisions of this article respecting trials by jury apply, as far as they are in their nature applicable, to trials by the court;" that under said section 5039 the citizens of said state and United States are entitled to the same protection and enforcement of the law, on a demurrer to the evidence where their causes of action are tried to the court, as when tried to a jury; and on trial to a jury, conflicting evidence cannot be weighed or considered by the court, and if there be any evidence tending to support the cause of the demurree, the said demurrer should be overruled; but in the case at bar, said court, on said demurrer, proceeded to weigh the evidence, find the facts and render final judgment on both the law and the facts in the case as the same stood on said demurrer, and found the law and facts against the plaintiff in error and thereby deprived her of her right and title to the lands in controversy; and plaintiff in error submits that such action of said court is, therefore, not due process of law, as guaranteed to her under said provisions of said Constitutions; and that by such actions of the court, she is not given the equal protection of the laws, as in said 14th Amendment is provided.

Third.

That said court erred in finding and holding that "the alleged marital relation between Ben Porter and Jennie McGilbray was not established by the proof and did not exist, either by reason of custom or the laws of the Creek Nation; that the relation was illicit; and the plaintiff, Nellie Porter, was the illegitimate child of this illicit relation," for on a demurrer to the evidence it was not in the power of said court to so find such facts, and the finding of the same was in violation of said respective provisions of said respective Constitutions, and therefore void and inoperative as such findings of facts in the case, and said judgment based thereon is likewise repugnant to said provisions of said Constitutions, and deprives the plaintiff in error of her property in said lands, contrary to said provisions and without due process of law, as thereby guaranteed by said Constitutions, as aforesaid; that said judgment is not warranted by the general law of the land relative to demurrers to evidence, but is in direct violation of the same, and therefore, without the sanction of law, justice or right; that on a proper application of the law which governed said demurrer to the evidence so adduced on said trial to the evidence in said case, the judgment of said court would have been in favor of the plaintiff in error on a proposition of law alone, which was the only matter which could be legally determined on such demurrer; that on a proper application of law which

governs a demurrer to evidence, the evidence adduced by the plaintiff in error amply showed a valid marriage between said Ben Porter and Jennie McGilbra, both according to the usages, customs and laws of said Creek Nation, and by the common law, which was in force in Indian Territory at the time of said marriage; that the common law was extended over said territory by Act of Congress of May 2 1890, in section 38 of which the Creek customs, marriages and domestic affairs were guarded and protected; and said judgment is against both said customs and tribal marriages and common law marriages, thus sanctioned by Congress and in force when such marriage was consummated, and deprives the plaintiff in error of such laws by so holding against the same in said judgment.

Fourth.

That said court erred in holding that the plaintiff in error, even if she had been illegitimate, was not entitled to said lands; for it is found in said judgment that "the plaintiff, Nellie Porter, was the illegitimate child of this illicit relation." If so, under the said Acts of Congress mentioned in the first assignment, the plaintiff in error would have been the sole and only heir to the lands in controversy, for it is so found that she is the "illegitimate child of this illicit relation," and, therefore the child of Ben Porter.

Again, section 258 of McKellop's "Constitution and Laws of the Muskogee Nation," provides: "If any person claim to be the child of a deceased male person, and it should be proven that such person did not, during life, recognize the claimant as his offspring, then such claimant shall not be entitled to any share in the estate of the deceased;" this was a part of the laws of descent of said Creek Nation and was in force at the time of this marriage and the birth of the plaintiff in error, and this feature is set out in both the original and amended petitions of the plaintiff in error, and therefore brought directly to the notice and attention of the court, and is still before the courts. This allegation was nowhere denied by the answers of the defendants in error, and now stands there uncontradicted. Besides, the proof on this point, namely, that Ben Porter recognized the plaintiff in error as his offspring, was abundantly proven by the testimony in the case. The judgment, therefore, is in direct violation of this law and the evidence on the matter, and denies the plaintiff in error her right and title to said lands, which, under said laws, she would otherwise have been entitled to had said court recognized and enforced said laws in this assignment mentioned.

Fifth.

That said Ben Porter and the plaintiff in error are full-blood Creek citizens and were so enrolled; that the lands in controversy was the allotment of

said Ben Porter under said Act of Congress entitled "An Act to ratify and confirm an agreement with the Muskogee or Creek Tribe of Indians, and for other purposes," or another Act of Congress entitled, "An act to ratify and confirm a supplemental agreement with the Creek Tribe of Indians, and for other purposes;" that when said Ben Porter died in November, 1906, said lands descended to his heirs under said last named act, and especially section 6 thereof; that under said Acts of Congress herein mentioned, and the laws and customs and usages of said Creek Nation, the plaintiff in error was, and still is, the rightful and legal heir of said Ben Porter, and entitled to said lands thereunder; that said judgment of said court was against said Acts of Congress and said laws, usages and customs of said Creek Nation, and thereby denied to the plaintiff in error her right, title and interest in and to the lands in controversy in this suit, contrary to the terms and provisions of said laws aforesaid.

ARGUMENT OF COUNSEL FOR PLAINTIFF IN ERROR.

First Assignment of Error.

That the said Supreme Court erred in holding that section 5 of the Act of Congress of February 28, 1891 (26 Stat. at L. 794, c. 383), which provides: "That for the purpose of determining the descent of land to the heirs of any deceased Indian, under the provisions of said act (Act Feb. 8, 1887, 24 Stat. at L. 388, c. 119), whenever any male and female Indian shall have cohabited together as husband and wife, according to the custom and manner of Indian life, the issue of such cohabitation shall be, for all the purposes aforesaid, taken and deemed to be legitimate of the Indians so living together, and every Indian child, otherwise illegitimate, shall for such purposes be taken and held to be the legitimate issue of the father of such child," was not extended in its operations to the territory occupied by the Creek Indians in the Indian Territory.

Acts of Congress of the United States.

It is a noteworthy fact that the Congress of the United States has, from time to time, since the origin of this government, passed statutes and made treaties with and for the various Indian tribes found within its borders, by which it has ever sought to protect the rights and the interests of their several

members. This matter was pointed out by Judge CAMPBELL in his able opinion in the case of *Kobogum* v. *Jackson Iron Co.*, above cited, and the matter is also discussed and extensively commented upon in the case of *In re Heirs of House*, 132 Wis. 212, by the Supreme Court of Wisconsin, also heretofore cited. Congress has at different times recognized the existence and validity of marriages among the Indian tribes, according to their usages and customs, and to set at rest all doubt of their validity, the legitimacy of their children, and power to inherit the estates of their parents, has passed laws directly upon that subject and legalized the marriages and legitimatized their posterity.

Let me call the court's attention to Sec. 38 of an Act of Congress, entitled, "An Act to Organize the Territory of Oklahoma; to Establish Courts in Indian Territory and for Other Purposes," passed the 2nd day of May, 1890. This was the Act of Congress which placed so many Statutes of Arkansas in force in Indian Territory, among which was Chapter 103, relating to marriages as provided by the legislature of that State, and thus adopted by Congress, with the significant exception hereinafter mentioned and discussed. Sec. 38 is declaratory of the duties of the clerks and deputy clerks of the United States courts therein provided, among which duties was to issue marriage license, etc. But after providing for these duties, there are the following provisos:

"*Provided*, That all marriages heretofore contracted under the laws or tribal customs of any Indian Nation now located in the Indian Territory, are hereby declared valid and the issue of such marriage shall be deemed legitimate and entitled to all inheritances of property or other rights, the same as in case of the issue of other forms of lawful marriage: *Provided, further*, That said chapter one hundred and three of said laws of Arkansas shall not be construed so far as to interfere with the operation of the laws governing marriages enacted by any of the civilized tribes, nor to confer any authority upon any officer of said court to unite a citizen of the United States in marriage with a member of any of the civilized nations until the preliminaries of such marriage shall have first been arranged according to the laws of the nation of which said Indian person is a member: and *provided, further*, That where such marriage is required by law of an Indian nation to be of record, the certificate of such marriage shall be sent for record to the proper officer, as provided in such law enacted by the Indian nation."

Here unquestionably where members of any of the Five Civilized Tribes were then living, residing and cohabiting together as husband and wife, and had children then or thereafter, this Act legalizes the marriage and the children, and makes them all each other's heirs of their property, respectively, even if they were or were not, legally married under their *own laws*, and their issue legitimate. This act precludes the courts from inquiry about such marriage or children, as come within the express

provisions of this section. Not only that, but it precludes chapter one hundred and three of the State of Arkansas thus put in force also from in anywise interfering with these *Indian laws*, and forbids the clerk to issue licenses to those attempting to marry Indians until the "preliminaries" are fixed up, etc. A custom or usage of marriages among tribal Indians, is as much a law of that tribe as if it was written; the same has ever been so recognized and upheld by the courts of this country.

Not only are marriages by custom recognized in that Act; but we find the same thing again referred to and provision made for tribal marriages in the Act of June 28th, 1898, in section 21 thereof, which is as fol'ows:

> "The rolls so made when approved by the Secretary of the Interior, shall be final, and the persons whose names are found thereon, with their descendants thereafter born to them, with such persons as may intermarry *according to tribal laws*, shall alone constitute the several tribes which they represent."

Thus, it may be seen that Congress, as late as June 28th, 1898, recognized and conceded that these tribes had the right, and did, regulate their domestic affairs as they saw proper; and it is expressly therein provided that such members as are so enrolled and "such persons as may intermarry according to tribal laws," shall be the members of the tribe. Not only that; but likewise their "descendants there-

after born." Then did Congress ever abolish these customs? We find the courts are forbidden to enforce their laws in this same Act; but that could not destroy the validity of this marriage between Ben Porter and Jennie McGilbra which took place about 1893. *Nevins* v. *Nevins*, 4 Ind. Ter. 574. Nor would it bastardize Nellie Porter who was born about 1895 in wedlock and as the heir apparent of Ben Porter and Jennie McGilbra, for, according to the evidence and the laws and decisions herein given, she was the legitimate child of this marriage and the rightful heir of her father. This Act of May 2nd, 1890, did not prohibit, but countenanced marriages among these tribes, according to their own laws; and the marriage in this case, arose in a few years *after* that act was thus passed, and long *before* the Act of June 28th, 1898. At the time of this marriage between Ben and Jennie the Creek Nation was governed almost absolutely by the laws and customs of said Nation, and exclusively as to its domestic affairs. The tribal relations of that Nation with the Federal Government has not yet been terminated, but are expressly held in force and existence by an act of Congress even to this day. But it would serve no useful purpose to go into details on that subject in this case.

Section 5 of the amendatory act of February 28th, 1891, relating to Indian affairs provided: "That for the purpose of determining the descent of lands to the heirs of any deceased Indian under

the provisions of the fifth section of said act, (Feb. 8th, 1887), whenever any male and female shall have cohabited together as husband and wife accord-to the custom and manner of Indian life, the issue of such cohabitation shall be, for the purposes aforesaid taken and deemed to be the legitimate issue of the Indians so living together, and *every Indian child*, otherwise *illegitimate*, shall for such purposes be taken and deemed to be the legitimate issue of the *father* of *such child*." By this Act of Feb. 8th, 1887, the laws of descent and distribution of the State of Kansas were extended over Indian Territory as to lands "which may be allotted in severalty under the provisions of this act," and the same were recognized and enforced in *Zane* v. *Zane* 4 Ind. Ter. 185, by the Court of Appeals of that territory. This Act of Congress of Feb. 8th, 1887 may be seen in Kappler's Law and Treaties, vol. 1, pages 33 to 36 inclusive. At the time this act was passed, "Indian Territory," of course embraced the present state of Oklahoma; and by section 8 of said act, it provides: "That the provisions of this act shall not extend to the territory occupied by the Cherokee, Creeks, Choctaws, Chickasaws, Seminoles and Osages, Miamis, and Peorias, Sacs and Foxes in the Indian Territory." etc.

Thus it would seem that by reason of sec. 5 of said act, "the laws of the State of Kansas regulating the descent and partition of real estate (should) so far as practicable, apply to all lands in

the Indian Territory which may be allotted in severalty under the provisions of the act," except "the territory occupied by the Cherokees, Creeks," etc. excepted in sec. 8 thereof, could not be partitioned or set apart and occupied in severalty as provided for in said act. Now, on the 28th of Feb., 1891, Congress amended said sec. 5 so as to read as heretofore set out, but with this proviso: "*Provided*, That the provisions of this act shall not be held or construed as to apply to the lands commonly called and known as the '*Cherokee Outlet*'."

Now the court can take judicial notice of the fact that the "Cherokee Outlet" never at any time included or embraced the Creek Nation. Consequently the Creek Nation was not excepted from the force and provisions of this amendatory act of Feb. 28th, 1891; nor were any of the other of the Five Civilized Tribes, or the Osages, Miamis and Peorias, and Sac and Foxes, so expressly excepted in the act of Feb. 8th, 1887. Just why Congress, in this last act, saw proper to except the "Cherokee Outlet," I do not know, nor is the reason apparent. But that has nothing to do with the case at bar, for if the provisions of the act of Feb. 28th, 1891, and especially Sec 5 above cited, applies to the Five Civilized Tribes, then it is absolutely immaterial whether Nellie Porter was legitimate or illegitimate. For by these provisions every child of its father is made the heir of the father, and takes equally with all other children of that father

no matter whether legitimate or illegitimate. This was so held in the *House* case in 132 Wisconsin above cited.

Not only this, but by another act of Congress, passed on the 3rd day of March, 1901, Congress again amended this act of Feb. 8th, 1887, by inserting in Sec. 6 thereof the words: "and every Indian in Indian Territory," after the words, "civilized life," in line thirteen of said section, see page 114 of Kappler. In Sec. 29 of the Act of Congress of May 2nd, 1890, Indian Territory is defined to be "all that part of the United States which is bounded on the north by the State of Kansas, on the east by the States of Missouri and Arkansas, on the south by the State of Texas, and on the west and north by the Territory of Oklahoma, as defined in the first section of this act."

Thus it will be seen that in this act of May 2nd, 1890, Congress defines Indian Territory to be as above stated, and in the act of Feb. 28th, 1891, extended that amendment defining who should be Indian heirs, and in the act of March 3rd, 1901, made the Indian Territory Indians citizens of the United States by so specifically amending Sec. 6 of the act of Feb. 8th, 1887. So taking this last act just mentioned with these two amendments aforesaid, we have them applying to all Indians of the United States except those on this "Cherokee Outlet." Not only this, but by Sec. 38 of the Act of May 2nd, 1890, above mentioned, Congress validated all mar-

riages where the parties were then living together as husband and wife, and made their issue their heirs, but this does not seem to extend to subsequent parties living in the same condition. So Congress came in with this amendment of Feb. 28th 1891, and that of March 3rd, 1901, making all children of such marriages, and also *illegitimate children*, the heirs of their father. This perfected the general scheme of Congress as to the heirs of an Indian under the control of that body, and determined who should get his estate on his death.

Not only this, but when providing for the Dawes Commission, and thereby preparing for the division of the lands of the Fve Civilized Tribes, Congress provided:

"The said Commission shall decide all such applications (of citizenship) within ninety days after the same shall have been made. That in determining such applications said commission shall respect all laws of the several nations or tribes, not inconsistent with the laws of the United States, and all treaties with either of said nations or tribes, and shall *give due force and effect to the rolls, usages and customs of each of said nations or tribes.*" Thus making it imperative upon that commission to observe all laws both of the United States and those tribes in determining these respective members of these tribes.

Thus it will be seen that these two acts of Feb. 28, 1891, and March 3rd, 1901, made a very greaf

change in the original act of Feb. 8th, 1887, and made the act as a whole operate throughout the United States as to Indian affairs, except this Cherokee Outlet, and made illegitimate, as well as legitimate, children inherit from their fathers. We are relieved in this case from determining who was the father of Nellie Porter, for by its decree the trial court has determined that for us, and held that Nellie was the illegitimate child of Ben Porter and Jennie McGilbra. So if our premises so far be correct, Nellie is entitled to the lands of her father, no matter whether legitimate or illegitimate.

Before entirely leaving this feature of the case and as to this marriage, let me call the court's attention to another act of Congress which we did not discover when discussing the marriage feature It is only incidental to the case, but has some bearing on the proof offered in the case at bar. By an act of Aug. 9, 1888, (Kappler, page 38), after providing that all Indain women who intermarry with white men shall be citizens of the United States provides: Sec. 3. "That whenever the marriage of any white man with any Indian woman, a member of any such tribe of Indians, is required or offered to be proved in any judicial proceedings, evidence of the admission of such fact by the party against whom the proceeding is had, or evidence of general repute, or of cohabitation as married persons, or any other circumstantial or presumptive evidence from which the fact may be inferred.

shall be competent." Here is practically a definition of Congress by which is described the marital relations between a white man and an Indian woman. All these matters are found in the testimony in the case at bar, and had Ben been a white man, this evidence would have been "competent" and sufficient to have established the marriage undoubtedly. Then, why should it require stronger proof of the marriage between them, simply because Ben was a Creek Indian also? The answer is not apparent, and I don't think any reason for holding him or her or their child to stricter proof can be given. As was said by Judges CAMPBELL, BISHOP and ROGERS in their works, much less proof should be required to establish marriage among Indians than whites; and the decisions and authorities above cited hold that way.

On the subject of bastardy, let me refer to Rogers on Domestic Relations. In Sec. 600, the author says: "As to the children of Indian marriages, celebrated betweeen the Indians in conformity to their laws, those laws must prevail when the validity of such marriages and the legitimacy of the children thereof are brought into question in any of the courts of the several states. That is, while the tribal relations of the Indans continue and they are recognized by the Federal government as Indians in the tribal state, the issue of such marriages will be held legitimate in the state courts for the purpose of inheritance, and, in fact, for general

purposes, if the marriage was valid and binding according to the forms, laws and customs in force among the Indians themselves, (citing *Earle* v. *Godley*, 42 Minn. 361, 44 N. W. Rep. 254, hereinbefore set out in full.) The Indians, so long as they maintain their tribal relations to each other and the balance of the world, and are so regarded by the general government, are in a sense foreign subjects, and their marriages are upheld upon the same principle that a marriage of a subject of a foreign country, valid according to the laws to which such subjects owe fealty, is valid everywhere, and the issue is legitimate. Nor will the fact that, by reason of the advance of civilization, or for other cause, the Indians have much modified their primitive habits and inclinations, alter the rule in any sense," citing same decision and *Blue Jacket* v. *Board of Commissioners*, 5 Wall. 737, 18 Law Ed. 667. I presume there will be no contention that the tribal relations of the Creek Nation and the general government did not exist at the time Ben Porter and Jennie McGilbra were married along about 1893. They then had their form of government, their laws and customs, which were universally known and recognized not only by the general government, but likewise by everybody. They also had their officers and legislative bodies, and a judicial system of their own origin, whose courts enforced their laws and customs and all this was enjoyed under express authority given them by the Federal Government itself, in

these original treaties, under which these people were induced to relinquish their claim to lands occupied by their fathers for generations past, and move west of the Mississippi. And those laws and form of government existed and were enforced by their own tribunals, until forbidden by Secs. 26 and 28 of the act of June 28th, 1898, which was long after Ben Porter and Jennie McGilbra were married according to the customs of their tribe extant among them at that time. Not only that, but such tribal relations exist even unto this day, and Congress expressly reserved its powers and authority over these Indians and their property in the first section of the Enabling Act, which is a similar power reserved by Congress in the Enabling Act admitting Kansas into the Union, and under whose power and authority arose the above cited case of *Blue Jacket* v. *Commissioners*, in which Justice DAVIS in delivering that opinion, pointed out these powers and the force and effect of Indian habits, laws and customs, and applied them in that case.

On the subject of bastardy, the same author, in Secs. 586 and 587, observes:

> *Sec. 586.* "The law always favors legitimacy, and will presume accordingly whenever it will not do violence to the facts and circumstances of the particular case. The presumption is necessary for the peace, order and welfare of society generally, and to shield the innocent child from the disgrace of bastardy as far as it is consistent and proper to do so, as well

as to assume the legal status of such children as citizens of the state. Illegitimacy, therefore, must always be affirmatively proven; it is never presumed in any case. 'The law presumes morality, not immorality; marriage and not concubinage; legitimacy, and not bastardy. Where there is enough to create a foundation for the presumption of a marriage, it can only be repelled by the most cogent and satisfactory proof.'

Sec. 587. "As the law so strongly favors legitimacy, it is often the case that slight proof will suffice to establish it. This is especially true after a long lapse of time and the incident difficulty in getting accurate and reliable evidence of the true parentage. In all such cases where the persons whose legitimacy is drawn in question have always been reputed legitimate and where their parents are shown to have cohabited together as man and wife, the law will usually supply any needed evidence of the marriage and the legitimacy of the issue by a presumption which has the same force and effect. And the courts are particularly ready to indulge this presumption where the parents, as well as the children whose legitimacy is at issue are dead and the march of time has hidden and obscured past events. For in such cases there can be little injury, usually, by indulging the presumption in favor of legitimacy, while to deny it would make proof of the actual facts necessary, and it might be impossible after many years to show the facts, though they may have existed, and though the proof at an earlier time might have been had without difficulty, and it would do great injustice to property rights

as well as inflict disgrace upon the innocent. After such a lapse of time, the law properly presumes the necessary facts. The presumption takes the place of the facts."

Here it will be observed that Ben, and his father and mother, are all dead, leaving only the mother of Nellie to tell of what actually took place at this critical moment, now so important in determining the rights of this innocent child of that union. During all these years since her birth, in 1895, not a word of suspicion had ever been cast against the legitimacy of this untutored child of the forest, and not even now is there a word, line or syllable of evidence of her illegitimacy adduced by the defendants in error, upon whom the law cast the burden of proof of such fact. Yet still, there is a decree against her, her legitimacy and her rights in the lands of her dead father, and that, too, upon a *demurrer to the evidence* of the plaintiff in error in this case, in which case and under which circumstances every presumption, inference and conclusion of legitimacy and the validity of such marriage, is resolved in her favor and against the defendants in error, and all conflicting evidence is waived by them and all facts pleaded, even where sustained by "the slightest degree" of proof, is taken by them thereon as admitted and fully proven. In the face of these matters, we are constrained to ask: Where is the ground on which can rest the decree of the trial court? If any such exists, we have been unable to see it, or even its shadow.

On the same subject and to the same effect, I refer the court to Secs. 579 to 614, in which this author discusses the subject thoroughly, and much fuller than anywhere else I have found. As to proof sufficient to establish legitimacy, the author, in Sec. 588, says: " * * * Some of the principles of the facts are 'that the individual has always borne the name of his father to whom he claims to belong; that the father has treated him as his child, and in that character has provided for his education, his maintenance and his establishment; that he has been uniformly received as such in society and that he has been acknowledged as such by the family," citing a long list of decisions to that effect. Was not all that done in the case at bar, except the education of the child? Both Ben and his mother acknowleged Nellie as his child, and it was taken into the home of his mother, where both Ben and his wife lived even after the child was born; for it was seen there at his mother's at different times by different people, but was born down at Jennie's mother's, near Eufaula. Ben told Roley Alexander soon after it was born it was his child, and that he was going down to see it. In another part of the same section, the author again says:

> "Indeed, the presumption of ligitimacy is so strong, that it is not overcome by a mere preponderance of proof. But evidence to overthrow it must be clear, strong and convincing. (Where is there any such evidence in the case at bar? There is no evidence at all in the case

against such legitimacy, for the defendants introduced none, but simply demurred to what was introduced and took their chances on winning out.) Illegitimacy cannot be established by showing from the declarations of the alleged deceased parents that the child alleged to be illegitimate was not theirs, where it is shown that such parents had been lawfully married and no impotency or impossibility of access on the part of the husband is shown. Such facts do not rebut the presumption that children born in wedlock are legitimate. * * * But whenever there is doubt of the legitimacy all reasonable presumptions are indulged in favor of legitimacy. If it is merely doubtful whether a child be legitimate or not, he will he held to be legitimate. And this presumption is so strong that it has been held not to be destroyed by proof of the fact that the child's mother was an Indian woman and its father a negro."

But in the case at bar, these presumptions, inferences and "doubts" were resolved *against* "legitimacy" of Nellie Porter, even on a demurrer to the evidence. It does seem to me that all such matters should have been resolved *in her favor*, according to these decisions and the decree been given in establishing her legitimacy and giving her the lands of her father.

Again, in Sec. 583, the author observes:

"It is now frequently provided by statute, in order to avert complications in the law of descent, as well as to fix a definite and certain status upon a class of children who would otherwise be illegitimate, that 'the issue of all mar-

> riages deemed null in law, or dissolved by divorce, shall be deemed and considered as legitimate (taken directly from Section 2526 of ch. 49 of Arkansas). But the effect of such statutes does not tend in any sense to validate the marriage itself; it only shields the issue from disgrace, confers the right of inheritance, and removes all legal disabilities of bastardy.
> * * * The effect of such legislation is to confer legitimacy, so far as inheriting property within the bound of the state where the law is in force is concerned, upon *all* children of such void marriages, though they be citizens of another state under whose laws they could not take property by inheritance, and though the marriage of the parents may have been celebrated in such foreign state."

It will be remembered that Ben Porter died on or about the 23rd of November, 1906. He, therefore died under the laws of Arkansas, from whose statutes the above parenthetical clause alludes. There remains not the slightest doubt but what Ben Porter and Jennie McGilbra supposed they were legally and lawfully married to each other. This is true especially with the mother of this child and Ben also. He told a number of persons that he was married, and that Jennie was his wife, and that Nellie was his child. Why should there be any doubt about the marriage, now largely dimmed by the lapse of time, with the witnesses all dead but one, who would have known the facts. If, for any reason, the marriage should be deemed null, this Sec. 2526, of Chapter 49 of Arkansas will still make Nel-

lie the legitimate child of Ben Porter, and thereby his lawful and sole and only heir at law, and as such entitled to the lands in controversy. But again, I ask, when every "inference," "conclusion" and "presumption" of the validity of this marriage between Ben and Jennie is resolved in her favor, as is shown by these numerous decisions and authorities I have cited in this brief must be done, and so held by the courts, and where all the facts charged in the petition are taken as admitted by the defendants in error, where they are supported by "the slightest degree" of evidence, and where all conflicting evidence is waived and disregarded by the court, and the court cannot "disbelieve" or "disregard" such testimony as tends to establish the claims of the plaintiff in error, on what legal basis can this decree, stigmatizing this little Indian child as a bastard, and depriving her of her father's estate, be predicated? My sense of comprehension and understanding may be dull, but if there is *any* ground on which this decree can stand, I am willing to acknowledge in cold print my own stupidity, for I fail to see it.

It is true that defendants in error tried to cast reflections upon the life and character of the mother of this child, in order that they might thereby gain the estate of its father, now resting in the dark chambers of the grave. For the greed of gain, they would wrest from the past ghost of suspicion of an illegal matrimonial connection of this father and mother, by way of insinuations on cross-examina-

tion, only to reap the benefits of what they hoped to gain by stigmatizing their defenseless offspring. Yet, at the same time, they parade themselves before the court demanding the lands of that father, under a deed obtained, in part, from their angel Lena whose illicit relations with that same father they failed to deny in their answer, and thereby admitted its existence. "Oh, consistency, thou art a jewel," They seek to tarnish the fair name of an innocent Indian child who has done them no wrong save to claim the lands of her father, but at the same time ask the court to relieve them on the evidence of a deed for the same lands, delivered with a tarnished hand, stained with the same tints of dishonor which they try to impute to the parents of this child. Such inconsistency and the lavish hand and promises of defendant, Wilson, too, evidently trying to thwart the ends of justice by his importunities to Thomas and Alexander, as shown in this record, present a strange picture in their offorts to blaspheme the name of this little orphan child. It reminds one of that quaint expression of Bobbie Burns:

> "O, wad some power the giftie gie us, to see oursels as ithers see us, It wad frae many a blunder free us, An' foolish notion."

There is another feature in this case to which I desire to call the attention of the court before leaving this branch of the subject, and that is the fact that, under these Acts of Congress, it became the sworn duty of the Dawes Commission to enroll

each member of the Five Civilized Tribes, and give to each such a description that he might thereafter be identified.

In Sec. 21 of the Act of June 28th, 1898, there is this provision:

> "Said commission shall make such rolls descriptive of the persons thereon, so that they may be thereby identified, and it is authorized to take a census of each tribe, or to adopt any other means by them deemed necessary to enable them to make such rolls." * * * "The members of said commission shall, in performing all duties required of them by law, have authority to administer oaths, examine witnesses, and send for persons and papers; any person who shall wilfully and knowingly make any false affidavit or oath to any material fact or matter before any member of said commission, or before any other officer authorized to administer oaths, to any affidavit or other paper to be filed or oath taken before said commission, shall be deemed guilty of perjury, and on conviction thereof shall be punished as for such offense."

Thus it will be seen that this Commission was a judicial body, with regular and extensive powers in the proper discharge of their duties, and had authority to send for persons and papers, but such person under oath as to their testimony therein, and in case of a false statement, it was perjury and punishable. In short, they had all the power necessary to properly ascertain such information as they needed in the discharge of their duties and when

discharged, they must file that report with the Secretary of the Interior, and it became final. In the discharge of their duties, it was within the scope of their authority to require the parents when listing their children to give such evidence respecting the children as they thought proper, and to incorporate that in this roll card, as it was called. Others might have been summoned also for the same purpose, and from such testimony this description on the card was made out, giving the name of the child, its roll number, its father, its mother, and grandparents, etc. These matters so listed on the roll card were not simply surplusage. It was a positive requirement of this Act of Congress, and was made the duty of this Commission to so find them. Now, in the case at bar, this Commission found on her roll card that the mother of Nellie Porter was Jennie, and her father was Pen Porter. This card may be seen on page 66 of the Record. The testimony of Johnson E. Tiger taken in the case, shows that there is no letter "b" in the Creek alphabet, and for that reason the word "Ben" would be pronounced "Pen" in the Creek language. Consequently, the father would be listed as Pen Porter, instead of Ben Porter. This explanation is nowhere denied. Now as this roll card is made out by this Commission, whose sworn duty required them to do it, and it was done in the discharge of their official acts, the presumption is that what they placed upon this roll card was correctly so obtained by this official body.

and officially made a matter of final record for all purposes. It is a rule of evidence that all official acts are presumed to be correct, and that officers do their duty, and that their findings are correct, until that presumption is overcome by some positive evidence to the contrary. See Jones on Evidence Secs. 42 to 50, inclusive. But it is not necessary to enlarge on that presumption, as it is known by everybody, but this rule of evidence prevails until overcome by convincing proof to the contrary.

From this roll card, it appears that Nellie Porter, who thereby and otherwise took her father's name, is the daughter of Ben Porter and his wife Jennie. This imports legitimacy, and thereby the validity of this marriage under the laws I have cited, and these facts must be presumed and adhered to throughout the development of this case, until they are overcome by other evidence affirmatively showing the contrary. But there is no such evidence in this record overcoming these matters, nor was there any effort on the part of defendants in error to establish the contrary by any evidence on their own behalf. But they rested their whole defense on a demurrer to the evidence of the plaintiff in error, which evidence, with these legal presumptions and uncontradicted allegations in her petition, and all matters so admitted by their demurrer, the inferences and conclusions arising therefrom, etc., I think fully establishes the legitimacy of Nellie Porter, the validity of the marriage of her

father and mother, and her unquestionable right to the lands in controversy beyond a reasonable doubt.

In closing this branch, we might consistently ask, if the defendants had evidence by which they could prove the invalidity of this marriage, the illegitimacy of Nellie Porter, or that she was no relation to Ben Porter, as they alleged in their answers, why did they not prove these facts at the trial? They did not do it, or try to do so, and the presumption is they could not do so, otherwise they would not have risked their whole defense and rights in this case, simply on a demurrer to the evidence, which, with cautious practioners, is seldom resorted to, in a critical case, for it is always dangerous and the demurrant takes his chances on an exceedingly slim margin, as this may prove to be his last card. It is nowhere claimed by defendants in error that Nellie was an illegitimate child of Ben Porter, but they claim in their answer that she was no relation to him whatever. The court found against them on that point, for it found she was the child of Ben Porter and Jennie, but on the grounds of illegitimacy she was denied the lands of her father. Illegitimacy of Nellie Porter was not made an issue in the pleadings in this case, still it was upon that alone that the court below rendered the decree against her. The decree is therefore contrary to the pleadings in the case on that point.

Again, the decree is that "the court finds that the alleged marital relation between Ben Porter and

Jennie McGilbra was not established by the proof, and did not exist, either by reason of custom or the laws of the Creek Nation; that the relation was illicit; that the plaintiff, Nellie Porter, was the illegitimate child of this illicit relation." I now respectfully submit that decree is not sustained by the "proof" taken in this case, and that the same should be reversed and a final decree given by this court in favor of the plaintiff in error, Nellie Porter, for the lands of her dead father, now sought to be obtained by strangers through this vile means of villifying the names and existence of these defenseless people in the manner undertaken in this case. As I suggested in the beginning of this brief, the evidence in this case would establish a common law marriage anywhere where such prevails in law, and it was on *that* theory the original petition in the case was drawn. But by the amended petition, it was thought safer to plead the customs of Creek marriages as well. But the court makes no finding as to whether it was, or was not, a marriage at common law.

The court will take notice that, on the 2nd of May, 1890, Congress put in force in Indian Territory a number of the Arkansas Statutes, and among that list is to be found the twentieth chapter. This was the adoption by Arkansas of the common law of England, and by this Act of Congress, the same was put in force in Indian Territory, on May 2nd, 1890. That was before Ben and Jennie were married, and

of course, if that chapter applied to the Indian tribes. it applied to the marriage of Ben and Jennie, and would be good and valid the world over, and their issue would be ligitimate everywhere and inherit the property of the father and mother. But, without going into a long discourse on marriages at common law, a discussion of which may be seen in Rogers on Domestic Relations, Secs. 83 to 98, etc., I invite the attention of the court to this feature of the case also, and ask that it be considered by the court as to the validity of this marriage. In my judgment, the same evidence necessary to establish a common law marriage, will likewise establish a marriage among the Creeks or other Indians, according to their usages and customs.

It is shown by the proof in this case, that those Creek customs existed among the Creek people in 1893-4-5, etc., and the common law may have existed there among them at the same time. If so, then this marriage would have been good and valid under either mode of marriage, and Nellie would be legitimate and entitled to the lands of her father. Either mode of marriage can be determained in this case. for both will come within the scope of the pleadings in the case, and so presented purposely in framing the petition, because of the uncertainty of the law governing this case. It would be one or the other of course, but both could exist in the Creek Nation at that time, and at the same time, and either or both be applicable to marriages even between the same

persons and at the same time, thus making the marriage valid under either law, or under both, for out of the facts the law arises, and where there are two systems of law, each enforceable as to the same subject matter, either law may be resorted to; or, it is possible, that those facts may make either or both systems applicable to that subject matter, and validate the undertaking. We insist that was the case here, and that this marriage between Ben and Jennie was valid, both at common law and under the usages and customs of the Creek Nation existing at that time, which is fully proven in the case.

If the marriage was valid under either system then, of course, the decree is plainly wrong, and should be reversed, and judgment given by this court for the plaintiff in error, and the lands decreed to her as the heir of her father with cost in the case.

Section 13 of an Act of Congress, passed on the 1st day of March, 1895, entitled, "An Act to Provide for the Appointment of Additional Judges of the United States Court in the Indian Territory, and for Other Purposes," provides: "That none of the provisions of any other acts, or of any of the laws of the United States, or of the State of Arkansas, heretofore put in force in said Indian Territory, except so far as they come in conflict with the provisions of this act, are intended to be repealed, or in any manner affected by this act, but all such acts and laws are to remain in full force and effect in said Territory." Those acts were again put back

in force in Indian Territory on the 28th of April, 1904, and made applicable to all persons and estates.

The court will observe that, under Sec. 38 of this Act of May 2nd, 1890, this Chapter 103 of Arkansas was made not to interfere with the marriages among these respective tribes, as heretofore pointed out, but no such an exemption or modification as that is therein or otherwise made as to Chapter Twenty, which related to the common law of Arkansas and of England. Hence, it would leave the common law in force in Indian Territory after May 2nd, 1890, then re-inforced again on March 1st, 1895, and then again on the 28th of April, 1904. Just how far the common law ever applied to these Indians, I do not know, and have never been able to ferret out. But it is too plain for dispute that if it applied at all along from 1890 to statehood, this marriage between Ben Porter and Jennie McGilbra was valid and their issue, Nellie Porter, is legitimate under the common law, as well as under the usages and customs of the Creek Tribe of Indians and entitled to the lands in controversy in this suit. The case of *Meiser* v. *Moore*, 96 U. S. 76, 24 Law ed. 826, was held by the Supreme Court of the United States to be a common law marriage between William Mowry and the Indian girl, Mary, the daughter of the Indian, Pero, and decree their only child, Elizabeth, the right to the lands in Pennsylvania involved in that case.

Second Assignment of Error.

That the court erred in holding that, on the demurrer to the evidence interposed by said defendants in error, the court could, and did, weigh the conflicting evidence in the case, and find the facts in the case and determine the rights of the parties hereto in said case, and there being evidence reasonably tending to support the court's findings, no reversible error was committed; that said demurrer to the evidence adduced in the case by the plaintiff in error presented to said court a proposition of law, and not of fact; to convey or transform said proposition of law thereby presented on said demurrer to said evidence, into a matter of fact, or to find the facts in said case thereon and render final judgment in said case against the plaintiff in error and in favor of said defendants in error, and thereby deprive and deny the plaintiff in error of her right, title and interest in and to said lands and quiet the title thereto in said defendants in error; that the action of said court in so rendering said judgment in said case and finding the facts therein against the plaintiff in error and in favor of said defendants in error, on said demurrer to the evidence of the plaintiff in error, is repugnant to, and in violation of the seventh section of article two of the Constitution of said State of Oklahoma, wherein it is provided that no person shall be deprived of life, liberty or property without due process of law; and the same is likwise repug-

nant to, and in violation of the 14th Amendment to the Constitution of the United States wherein it is provided: "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property, without due process of law, nor deny any person within its jurisdiction the equal protection of the laws;" that section 5039 of the Revised Laws of the State of Oklahoma, provides: "The provisions of this article respecting trials by jury apply, as far as they are in their nature applicable, to trials by the court;" that under said section 5039 the citizens of said state and United States are entitled to the same protection and enforcement of the law, on a demurrer to the evidence where their causes of action are tried to the court, as when tried to a jury; and on trial to a jury, conflicting evidence cannot be weighed or considered by the court, and if there be any evidence tending to support the cause of the demurree, the said demurrer should be overruled; but in the case at bar, said court, on said demurrer, proceeded to weigh the evidence, find the facts and render final judgment on both the law and the facts in the case as the same stood on said demurrer, and found the law and facts against the plaintiff in error and thereby deprived her of her right and title to the lands in controversy; and plaintiff in error submits that such action of said court is, therefore, not due process of law, as guaranteed to her under said provi-

sions of said Constitutions; and that by such actions of the court, she is not given the equal protection of the laws, as in said 14th Amendment is provided.

This assignment presents that a demurrer to the evidence presents a proposition of law and not of fact; and that conflicting evidence in the case is not to be considered, if there be evidence even tending to support the claims of the demurree.

A demurrer to evidence raises an issue in law on the facts established by the evidence of the demurree, 38 Cyc 1541 and thereafter, where it is observed:

> "*Demurrer to Evidence*—1. *Definition and Nature.* A demurrer to evidence is analogous to a demurrer to pleading, and although not precisely similar to a motion for non-suit, bears a close analogy thereto. It arises on an issue in law on the facts established by the evidence, and is a proceeding by which the court in which the action is pending is called upon to decide what the law is upon the facts shown in evidence" (citing numerous decisions).

Standard Encyclopedia of Procedure, Vol. 7 pages 4 and 5, where the author observes:

> "The demurrer to evidence raises an issue of law upon the facts established by the evidence, changing the issue in fact to an issue in law and transferring it to the court." *(C.* admissions.) "A demurrer to the evidence not only admits the truth of the evidence of demurree, but also all the facts which the evidence in any degree tends to prove, and is a waiver of

all the evidence of the demurrant which conflicts with that of his adversary, and all inferences from his own evidence (although not in conflict with his adversary's) which do not necessarily result therefrom.

The court does not in such a proceeding perform the functions of a jury. The facts are admitted, and the court applies the law to them and determines which party to the issue should succeed upon such facts.

It is the duty of the court to consider as true every portion of the evidence tending to prove the case of the party resisting the demurrer, and not to weigh conflicting evidence and the court in considering the demurrer cannot go into an investigation of the facts in dispute or attempt to reconcile conflicting or inconsistent testimony.

Limitation of Rule. While a demurrer to evidence admits as true all facts of which there is any evidence, and all inference which a jury might draw from them, or which may be reasonably drawn therefrom, forced and violent inferences are not admitted. Conclusions of a witness, or other incompetent evidence that may be admitted over objection, will not be considered'' (citing numerous authorities).

In Vol. 6 of Encyclopedia of Pleading and Practice, commencing with page 441, this author observes:

''A demurrer to the evidence admits all the facts which the evidence tends to prove, or of which there is any evidence, however slight, and all inferences which can be logically and reasonably drawn from the evidence.

In passing on and deciding the questions presented on the demurrer, the court must consider not only all the facts which the evidence tends to establish, but also all such fair and reasonable inferences of fact as the jury, if trying the cause, might have lawfully drawn from such evidence.

Inferences by the Court. But while the rule is thus favorable to the party whose evidence has thus been withdrawn from the consideration of the jury by the demurrer, it must be borne in mind that he is not entitled to claim that more shall be inferred from his evidence by the court than the jury might reasonably and fairly have inferred from it had they been allowed to pass upon it. The court is not at liberty to make inferences of fact in favor of the demurrant to countervail or overthrow either presumptions of law or inferences of fact in favor of the other party. No forced and arbitrary inferences are admitted.

2. *What is waived* — a. *Demurrant's Evidence.* Where a party demurs to the evidence the general rule is that no evidence introduced by him can be considered upon the demurrer. He is deemed to have waived it. The demurrant attacks the evidence of his adversary, and, in the very nature of things, this attack cannot be aided by his own evidence.

Burden of Issue Resting on Demurrant. He assumes the position which he occupies under the pleadings, and if, under the pleadings, the burden of any issue rests upon him, that issue cannot be determined in his favor upon the demurrer. For the purposes of the decision of the demurrer he abandons all claim upon that issue, and as to an issue of which he has

not the burden, he cannot, by his demurrer cause his own evidence to be taken as true or to be considered.

Exceptions. In two states, where the practice of inserting all the evidence on both sides into the demurrer obtains, the rule is not quite so broad. The defendant is considered to have waived all his evidence which is contradictory to that of the other party, all evidence the credit of which is impeached, and all inferences from his evidence which do not necessarily flow from it.

b. *Evidence of Demurree Favorable to Demurrant.* If the evidence demurred to is conflicting, a demurrer operates as a withdrawal from the consideration of the court of whatever is favorable to the party demurring.

Reconciling Conflicting Evidence. In passing upon the evidence demurred to, the court will not attempt to reconcile conflicting evidence, but will take as true every fact of which there is evidence.

c. *Objections of Competency of Evidence.* Upon a demurrer to evidence no objection to its competency can be taken; this objection is deemed waived. On the other hand it has been held, and with perfect propriety, that, by demurring to evidence the demurrant does not deprive the demurree of the right to make available, questions upon the rulings excluding evidence."

This case is reported in the 39th Oklahoma, page 500, and in 135 Pac. 732, and the opinion was finally handed down on October 21, 1913. We respectfully submit that this case stands alone upon a demurrer

to evidence interposed by the defendants in error to the evidence of the plaintiff in error, and may be seen on pages 70 and 71 of the record, as follows:

> "By Mr. Walker: We would like at this time to interpose a demurrer to the testimony.
>
> By Mr. Moore: The defendants at this time demur to the evidence of the plaintiff in this case and request the court to render judgment in favor of the defendants in accordance with the prayer of their answer, for the reason that the testimony of the plaintiffs in this case does not prove any marriage even under the customs by them relied upon.
>
> By the Court: The demurrer will be sustained and the decree will be entered for the defendants.
>
> By Mr. Lawson: If the court please, I want an exception."

The original petition of the plaintiff in error may be seen in the record on pages 20 to 24, inclusive; the answer thereto of defendants in error may be seen on pages 24 and 25; and the reply to said answer interposed by the plaintiff in error may be seen on page 26, whereby all the affirmative matters set up in the answer of the defendants in error are specifically denied by the plaintiff in error. Then on the 21st of January, 1911, the plaintiff in error filed her amended petition in the cause, as shown on pages 26 and 27, and wherein she sets up that this marriage between her father and mother was according to usages and customs of the Creek Nation and sets out what those customs were. To this

amended petition the defendants in error filed their answer on the 24th day of January, 1911, as may be seen on pages 28 and 29 of the record, in which amended answer they deny this marriage and these usages and customs, and in order to avoid the same, they set up section 310 of the Constitution and Laws of Muskogee Nation, 1893, at page 108, as follows:

> "*Section 310.* Marriages may be solemnized by any of the judges of the courts of this nation or by any ordained minister of the Gospel in regular communion with any religious society, and any marriage contracted in writing or in the presence of two or more witnesses, who shall sign the marriage contract as such, shall be lawful;"

and then by way of affirmative relief proceeded further, as follows:

> "Further answering defendants allege that at the time of the death of said Ben Porter, he was survived by his wife Lena Porter, and his brother, Sam Porter, and his sister, Nannie Broadnax, who were the sole and only heirs of said Ben Porter, deceased, and that as such heirs at law of said Ben Porter, deceased, said Lena Porter, Nannie Broadnax and Sam Porter did, for a valuable consideration, make, execute and deliver to these answering defendants, deeds of conveyances by which they conveyed to these answering defendants an indefeasible estate of inheritance in and to all the lands described in the petition of plaintiff.
>
> Further answering defendants say that the plaintiff herein took no right, title or interest in and to the premises described in her petition.

but allege that the said Sam Porter, Lena Porter and Nannie Broadnax were the sole and exclusive heirs of the said Ben Porter, deceased.

Wherefore, premises considered, defendants pray that the suit of plaintiff be dismissed; that she take nothing herein and that the title of these answering defendants be quieted forever in them, and that the plaintiff and all persons claiming by, through or under her be forever enjoined from asserting any right, title or interest in or to said premises, and for their costs in this action laid out and expended and for all further relief which to the court may seem proper.

WALKER & FANCHER &
MOORE & NOBLE."

To this amended answer, the plaintiff in error, on the same day, filed her reply, which, omitting the caption, is as follows:

"Comes now the plaintiff by her next friend, guardian, etc., and for her reply to the amended answer herein of Ollie A. Wilson, Charles W. Wilson, Omer A. Garner and W. M. Jackson herein filed on the 29th day of November, 1910, and another amended answer filed herein on this the 24th day of January, 1911 denies each and every charge, statement and allegation therein contained whereby said defendants seek to set up matters therein of and in the nature of affirmative relief except as hereinafter admitted; and denies specifically that said Lena Porter, Sam Porter and Nannie Broadnax were the sole and exclusive heirs of said Ben Porter; that said Lena Porter, Sam Porter and Nannie Broadnax as the heirs of

said Porter deceased, made executed and delivered to said answering defendants deeds of conveyance by which they conveyed to said defendants an indefeasible estate of inheritance in and to said lands described in said petition; and deny that the purported laws of marriage as set up in said amended answer were the laws of marriage of said Creek Nation therein mentioned, and denies every charge and statement therein contained as to said marriage and divorces as therein set up in said amended answer; and denies specially that at the time of the death of said Ben Porter, he was survived by his wife Lena Porter and his brother Sam Porter and his sister Nannie Broadnax, who were the sole and only heirs of said Ben Porter deceased, and that as such heirs at law of said Ben Porter, deceased, said Lena Porter, Nannie Broadnax and Sam Porter did, for a valuable consideration, make, execute and deliver to said answering defendants deeds of conveyance by which they conveyed to said defendants an indefeasible estate of inheritance in and to said lands, and charge that such allegations therein contained are not true; and denies further that said Lena Porter, Sam Porter and Nannie Broadnax were the heirs of said Ben Porter deceased, and deny that they, or any of them had any right or title in said lands, and also denies that the plaintiff was not the heir of said Ben Porter, and denies that she has no right title or interest in said lands as the heir of said decedent or otherwise; but plaintiff admits *the* both said Ben Porter and Jennie McGilbra were citizens of said Creek Nation and said Creek Tribe of Indians; and charge that they, said Ben Porter and Jennie McGilbra, were citizens

of said tribe and nation and members thereof at the time of said marriage herein referred to in the pleadings in this case, and long prior thereto, and ever thereafter; and that long before said marriage and ever after their respective births, and during all the time of marriage to each other as aforesaid, said Ben Porter and Jennie McGilbra, lived and resided in said nation and among and as members of said Creek Tribe of Indians.

LEWIS C. LAWSON,
Counsel for Plaintiff."

Thus, by their answer the defendants in error sought affirmative relief in this case and claimed said lands by attempting to set out that said Lena Porter, Sam Porter and Nannie Broadnax were the sole and only heirs of said Ben Porter, and that for a valuable consideration they had conveyed the lands to these answering defendants; and then affirm that the plaintiff took no right, title or interest in or to the lands described; and in order to avoid the legal effect and consequence of the allegation of the plaintiff, wherein she set up the usages and customs of marriage among the members of said Creek Nation and her marriage with said Ben Porter, according to said customs and usages, the defendants in error deny these facts in the first part of this answer and then set up said section 310, as the statutory provision of said nation, in the compliance of which alone they maintain a marriage could be solemnized by members of said tribe at the time this marriage is

claimed to have taken place between Ben Porter and Jennie McGilbra.

Thus, by these pleadings, the defendants in error undertook to show, *first,* that there was no marriage between Ben Porter and Jennie McGilbra, because the evidence adduced by the plaintiff in error failed to show that they had ever been married, or in the exact language of Mr. Moore in his demurrer to the evidence, "for the reason that the testimony of the plaintiffs in this case does not prove any marriage even under the customs by them relied upon" (pages 70 and 71); and, *second,* that Lena Porter, Sam Porter and Nannie Broadnax were the sole heirs of Ben Porter, deceased, and had conveyed to the defendants in error the lands in controversy, and therefore, they were true owners of the lands and entitled to a decree in their favor, as thus prayed for in their answer.

All these affirmative matters thus alleged and set forth by the defendants in error being thus denied in the reply of the plaintiff in error, the burden of proof of these matters was thus devolved upon the defendants in error before they could prevail in this case. Yet, at the close of the testimony taken on behalf of the plaintiff in error, these defendants in error thus interposed this demurrer to her evidence, without having adduced a single word, line or syllable of evidence on their behalf to sustain or support these affirmative matters thus set up by them in their said answers. To this, they may con-

tend that said section 310 had been established on the cross-examination of John A. Jacobs on page 33 of the record; but to this plaintiff in error objected "for the reason that the passage of such acts by the Creek council prescribed certain ways and manners in which the Creek members might marry, but does not prohibit them from being married in any other manner, and for that reason the passage of such a law is incompetent, irrelevant and immaterial in this case." This objection was overruled by the court and the plaintiff in error excepted. Mr. Jacobs was then asked: "Now, Mr. Jacobs, I hand you here to refresh your memory, a book known as the Constitution and Laws of the Muskogee Nation, 1893, at page 108, section 310 thereof, and ask you if that is the act of the council to which you refer (handing witness book)?" To this plaintiff's counsel objected as follows: "Plaintiff objects to the foregoing question and any answer thereto for it is sought to be set up for the defendants themselves as affirmative matter." The court overruled the objection, and plaintiff excepted. Then the witness answered: "Yes, sir." Then counsel for plaintiff in error moved to strike out the answer to the last question and commenced to assign reasons; but the court observed: "You have already objected to the question." Whereupon counsel for plaintiff in error observed: "For the reason even admitting said laws that existed as therein referred to, it does not destroy the Creek custom and usages pertaining to

marriages among the Creeks and in the Creek Nation and for that reason it is irrelevant and improper in this case." But the court overruled this objection, and again plaintiff in error excepted, as shown on page 34 of the record. This witness then finished his testimony as follows:

> "By Mr. Moore: Q. Now, Mr. Jacobs, was there any other written statute, or law among the Creeks, governing marriages? A. No, sir. Q. I will ask you Mr. Jacobs, that if, prior to the passage of this act, it had not gotten to be a very common practice among the Creeks to live together illicitly, and if this statute was not passed to remedy that evil? A. The way I understand it, it was passed for the reason they was having trouble in these plural marriages as to inheritance of personal property. Q. It had become difficult to determine the parentage of children? A. Yes, sir. Q. And this was the reason for the passage of this act? A. Yes, sir; and plural marriages. Q. Now, after the passage of this act, Mr. Jacobs, was it not incumbent upon citizens getting married lawfully to comply with that act? A. Not necessarily. By Mr. Moore: That is all, Mr. Jacobs."

Thus it is shown by this witness that said section 310 was the only written statute or law among the Creeks governing marriages. But this witness, Johnson E. Tiger, Barney Tiger and others testifying in this case show that even during the existence of this written statute and after its enactment, marriages among these Creeks, according to their usages and customs still prevailed; and that such mar-

riages were held valid and the offspring of such marriages were deemed legitimate under the laws, usages and customs of said Creek Nation.

On this demurrer to the evidence by the defendants in error and as its ruling thereon, the trial court observed: "The demurrer will be sustained and the decree will be entered for the defendants," as shown on page 71 of the record. Then, it proceeded to render its judgment, and after passing on the demurrer, motions to strike, etc., it decreed as follows:

> "This cause coming on to be heard on this 24th day of January, 1911, upon the pleadings and upon the evidence offered on the part of the plaintiffs, and upon the plaintiff resting her cause with the court upon the evidence offered. the defendants demur to the evidence and the court doth sustain the demurrer thereto, and:
>
> The court finds that the alleged marital relation between Ben Porter and Jennie McGilbra was not established by the proof and did not exist, either by reason of custom or the laws of the Creek Nation; that the relation was illicit; that the plaintiff Nellie Porter was the illegitimate child of this illicit relation.
>
> It is therefore considered, adjudged and decreed by the court that the bill of the plaintiff be dismissed; that the title in and to the premises in this controversy contained, being the lands allotted to Ben Porter deceased, be forever quieted in these defendants against this plaintiff and that the defendants have and recover of and from the plaintiff all their costs in this behalf expended for which let execution issue. MALCOM E. ROSSER, *Special Judge.*

Attest: T. E. NEAL, *Clerk*" (as shown on page 71 of the record).

On the 25th of January, 1911, plaintiff in error filed her motion to set aside said judgment and to grant her a new trial; but the same was overruled by the court, and she duly excepted, as shown on pages 72 and 73 of the record.

Here the court will observe that these defendants in error *demur to the evidence of the plaintiff in the case;* and it was the demurrer to the evidence that was sustained by this trial court; and upon the result of the court so sustaining that demurrer to the evidence, this judgment was thus rendered. This is made emphatic not only by the ruling of the court on this demurrer to the evidence, but the same is thus shown upon the very face of the judgment itself, wherein that judgment recites:

> "This cause coming on to be heard on this 24th day of January, 1911, upon the pleadings and upon the evidence offered on the part of the plaintiffs, and upon the plaintiff resting her cause with the court upon the evidence offered, the defendants demur to the evidence and the court doth sustain the demurrer thereto, and:
>
> The court finds that the alleged marital relation between Ben Porter and Jennie McGilbra was not established by the proof and did not exist, either by reason of custom or the laws of the Creek Nation; that the relation was illicit; that the plaintiff Nellie Porter was the illegitimate child of this illicit relation."

Thus, from ths very judgment itself, the trial court decided the case, *first,* upon the pleadings; *second,* "upon the evidence offered on the part of the plaintiff;" and, *third,* upon "the defendants' demurrer to the evidence;" and that "the court doth sustain the demurrer thereto;" and from these three matters thus considered by the court, it found, *first* "that the alleged marital relation between Ben Porter and Jennie McGilbra was not established by the proof and did not exist, either by reason of the custom or the laws of the Creek Nation;" *second,* "that the relation was illicit," etc.; and, *third,* "that the plaintiff, Nellie Porter, was the illegitimate child of this illict relaton." It then dismissed the bill and decreed the title to the lands to the defendants in error and decreed the costs to the defendants in error against the plaintiff in error.

Thus, the plaintiff in error was denied the allotment of her deceased father, the inheritance of which arose under an Act of Congress existing in Indian Territory at the time of the death of her father in November, 1906, and known as the Creek Supplemental Agreement, supplemented by another Act of Congress approved on the 28th of April, 1904 whereby all former Statutes of Arkansas put in force in said territory were continued and extended over said territory and made applicable to all persons and estates in said territory, whether Indian freedman or otherwise; and said decision, being adverse to the plaintiff in error and thus denying to

her her rights arising under said Acts of Congress to the lands in controversy in this suit, brings this case under and within the jurisdiction of this court, not only by reason of said Acts of Congress, but likewise for the further reason, as we contend in this case, that said decision and the disposition of said cause is not due process of law, as guaranteed to the citizens of the United States by the 14th Amendment to the Constitution of the United States, as claimed under this assignment of error.

The court will observe that this decree is based on the action of the court in sustaining said *demurrer to the evidence* offered on part of the plaintiffs; and then found that "the alleged marital relation between Ben Porter and Jennie McGilbra was not established by the proof and did not exist, either by reason of custom or the laws of the Creek Nation." Thus, in determining that marital relation between Ben Porter and Jennie McGilbra, the court considered only the "custom" or "laws of the Creek Nation." We submit, that the testimony taken in this case, especially when the same has to be weighed, considered and governed by the law, which governs courts in passing upon a demurrer to evidence, shows clearly that Ben Porter and Jennie McGilbra were married according to the Creek law, their usages and customs relative to marriage among themselves, as will be amply shown by the numerous decisions and authority hereafter cited in this brief on that subject. But, independent of that particular

feature, the attention of the court is called to the fact that on the 2nd day of May, 1890, by an act approved on said date, the Congress of the United States spread numerous statutes of Arkansas over Indian Territory, among which was chapter 20 of said statutes, which relates to the common law of England; and in that same act express provisions were made as to the application of these statutes among the Indians, as shown in sections 30 and 31 of that act and other Acts of Congress hereinafter cited and which recognized the usages, customs and marriages of the members of these respective tribes. Said chapter 20 so relating to the common law and spreading it over Indian Territory on the 2nd of May, 1890, still existed in that territory in 1893, at the time Ben Porter and Jennie McGilbra are claimed to have been married; and the evidence in this case, adduced on behalf of the plaintiff in error, especially under the rule respecting a demurrer to evidence, is amply sufficient to establish a common law marriage between them. Yet, this feature is not mentioned in this decree, but a common law marriage between them is also denied by implication arising out of the decree. The attention of the court is also called to the fact that said section 310 of said Creek laws does not prohibit marriages in any way other than in said section prescribed; and by the testimony of John Jacobs, Johnson E. Tiger, Barney Tiger, Robert Thomas and others taken in this case, it is shown that said statute was not exclusive

of marriages in other modes or manners, and that it was the usage, habit and custom of Creek citizens to marry by their tribal customs and usages after that act was passed the same as before it was passed. Said section 310, not expressly prohibiting marriages in any other manner than therein prescribed. said section did not govern this case or marriages in the Creek Nation after its passage, but marriages could be performed after that time according to the usages and customs of said tribe the same as before. *Meister* v. *Moore, et al.*, 24 L. ed. 826, point 1, which is as follows:

> "*1.* In the absence of any positive statute, declaring that all marriages not celebrated in the manner therein prescribed shall be void any marriage regularity made according to the common law, without observing the statute regulations, is a valid marriage."

See also *Calyton* v. *Calyton*, 74 Pac. 491, 51 L. ed. 566, and many other decisions cited and referred to in the subsequent part of this brief, involving Indian marriages.

By the decision of the Supreme Court it tries to make it appear that this judgment of the trial court was rendered upon a motion of the defendants in error for a judgment as prayed for in their answer. This suggestion does arise in connection with their demurrer to the evidence, as above shown. But, a ruling of the court and the judgment it rendered show beyond controversy that the court acted

upon their demurrer to the evidence so offered by the plaintiffs, and there is no escape from that conclusion, for the judgment shows this fact upon its face and by that judgment the defendants in error are estopped to deny it; and we insist that the result of this whole action was brought about alone by this demurrer to the evidence of these defendants and that the law governing a demurrer to the evidence will not sustain the action of the court or the judgment rendered in this case, as shown by the authorities and decisions herein cited.

A demurrer to the evidence waives all conflicting statements; admits all facts which such evidence proves even in the slightest degree, *Ziska* v. *Ziska*, 20 Ok. 634; and all the inferences and conclusions which may be reasonably and logically drawn from the evidence: *Idem* v. *Idem; Jaffrey* v. *Wolf*, 1 Ok. 312; *Clark et al.* v. *O'Toole et al.*, 20 Ok. 319; *Jaffray* v. *Wolfe*, 4 Ok. 303; *Edmisson* v. *Drumm-Folto Com. Co.*, 13 Ok. 440; *Shawnee Light & Power Co.* v. *Sears* 21 Ok. 13; *Janson* v. *City of Atchison*, 16 Kan. 358, point 3; *Waterson* v. *Rogers*, 21 Kan. 529; *Simpson* v. *Kemberlin*, 12 Kan. 579; *Kansas P. R. R. Co.* v. *Couse*, 17 Kan. 571; *R. R. Co.* v. *Doyle*, 18 Kan. 62; *Shafer* v. *Weaver*, 20 Kan. 296; *Birks* v. *French*, 21 Kan. 244; *Brown* v. *R. R.*, 31 Kan. 1; *Wolf* v. *Washer*, 32 Kan. 533, 4 Pac. 1036; *Christie* v. *Barnes*, 33 Kan. 317, 6 Pac. 599; *Schuster* v. *Kurtz*, 47 Kan. 255, 27 Pac. 994; *Buoy* v. *Clyde Mill Co.*, 68 Kan. 436, 75 Pac. 466; *Archer* v. *Norman*, 72 Kan. 586, 84 Pac.

531; *Pawling* v. *United States*, 4 Cranch. 219, 2 Law ed. 601; *Suydam* v. *Williamson*, 20 How. (U. S.) 427, 15 Law ed. page 981; *Van Stone* v. *Stillwater & Bierce Manufacturing Co.*, 142 U. S. 128, 35 Law ed. 963; *Parks* v. *Ross*, 52 U. S. 11 How. 362, 13 Law ed. 730; *Louisville & N. R. Co.* v. *Woodson*, 134 U. S. 614, 33 Law ed. 1035; Standard Ency. of Proc., vol. 7, pages 5, 6, 7 and 8 and the numerous decisions therein cited; Ency. of United States Supreme Court Reports, vol. 5, pages 289, 290 and 291; Phillips on Code Pleading, section 516; Stephens on Pleading, pages 121 and 122; Perry's Common Law Pleading, page 207; *Jones* v. *Old Dominion Mills* 3 Va. 92; *Richmond Ry. Co.* v. *Garthwright*, 53 Va. 839; *Flannagan* v. *Chesapeake etc. R. R. Co.*, 52 W. Va. 896.

And, too, on a demurrer to evidence, all conflicting evidence is considered waived, and the court cannot consider the same. *Ziska* v. *Ziska*, 20 Ok. 634; *Colt* v. *Missouri, K. & O. Co.*, 20 Ok. 227; *Shawnee Light & Power Co.* v. *Sears*, 21 Ok. 13; *Wolf* v. *Washer*, 32 Kan. 533, 4 Pac. 1036; *Christie* v. *Barnes*, 33 Kan. 317, 6 Pac. 599; *Wingfield* v. *McClintock et al.*, 85 Kan. 207, 113 Pac. 394; *Corbet* v. *Smith*, 101 Tenn. 368, 47 S. W. 694; *Scheerer* v. *Chicago etc. R. Co.*, 12 Ind. App. 157, 30 N. E. 756; *Plaskett* v. *Benton-Warren Agr. Soc.*, 45 Ind. App. 358, 89 N. E. 968, 90 N. E. 908; *Kansas City, F. S. & G. R. Co.* v. *Cravens et al.*, (Kan.) 23 Pac. 1044;

Coy v. *Missouri Pac. Ry. Co.*, 69 Kan. 321, 76 Pac. 844, and the cases above cited.

See also *Scully* v. *Williamson*, 26 Ok., page 21. where Justice HAYES observed:

> "When a demurrer to the evidence is interposed, it must be taken that he who interposes it admits all the facts which the evidence in the slightest degree tends to prove, and all the inferences or conclusions which may be reasonably and logically drawn therefrom, and the court will not weigh conflicting evidence, but will treat, as withdrawn, all the evidence which is most favorable to the party demurring. *Ziska* v. *Ziska et al.*, 20 Ok. 634, 23 L. R. A. (N. S.) 1; *Edmission* v. *Drumm-Floto Commission Co.*, 13 Ok. 440, 73 Pac. 958."

This quotation is the law in a nutshell on a demurrer to evidence, in this jurisdiction, and the same is in accord with the general law on that subject through the entire country, except where there is a statute which governs the matter. In fact, this is the inevitable conclusion and result to be derived from our own statutes shown in the Revised Laws. vol. 2, page 5002, which provides:

> "The party on whom rests the burden of the issues must first introduce his evidence; after he has closed his evidence the adverse party may interpose and file a demurrer thereto, upon the ground that no cause of action or defense is shown."

From this provision of the statute it is apparent that under our jurisdiction a demurrer to evi-

dence can be interposed for but one of two grounds. namely, because "no cause of action * * * is proved"; or, because "no cause of * * * defense is proved." From this, it is evident that if there be *any* evidence to sustain the cause of action or defense, it is error to sustain the demurrer to the evidence. *Citizens' Bank of Wakita* v. *Garnett et al.* 21 Ok. 200; *Plotner* v. *Chillison & Chillison,* 21 Ok. 224; *Jansen* v. *City of Atchison,* 16 Kan. 358; *Kansas P. Ry. Co.* v. *Couse,* 17 Kan. 571; *Waterson* v. *Rogers,* 21 Kan. 529; *Rowland* v. *Shaw,* 29 Kan. 438. and cases above cited.

And, too, this law applies to trials to the COURT the same as to trials to the JURY, as may be seen from the express provisions of our statute, in section 5039 of the Revised Laws, which provides: "The provisions of this article respecting trials by jury apply, as far as they are in their nature applicable, to trials by the court." 38 Cyc. 1946, notes 45 and 46; 40 Cyc, 1333.

This statute of procedure was taken from Kansas, and this section may be seen in section 4407 thereof. The same provision is found in the Statutes of Oklahoma (1893), section 4202, and had been adopted from Kansas long prior to statehood. So that this provision came to us directly from Kansas through these Statutes of Oklahoma of 1893, and is now found in the Revised Laws in section 5039, above quoted. In the construction of statutes, it is a time-honored principle as old as the law itself that where

a state or country adopts the statute of another state or country, the prior construction of the adopted statute of another court of last resort of the mother state or country, is to be taken, held and construed as a part of the adopted statute, and is as much in force in the adopting state or country as the statute itself. *Pennock* v. *Dialogue*, 2 Pet. 18, 7 Law ed. 125; *Hardenberg* v. *Ray*, 151 U. S. 123, 38 L. ed. 280; *McDonald* v. *Hovey*, 110 U. S. 628, 28 Law ed. 269; *Brown* v. *Walker*, 161 U. S. 600, 40 Law ed. 822; *Gilman* v. *Sheboygan*, 2 Black 510, 17 Law ed. 305; *East Oakland Twn.* v. *Skinner*, 94 U. S. 255, 24 Law ed. 125; *Hardenberg* v. *Ray*, 151 U. S. 123, 38 Law ed. 93; *Henriette Mining etc. Co.* v. *Gardner*, 173 U. S. 130, 43 Law ed. 637; *Stutzman Co.* v. *Wallace*, 142 U. S. 293, 35 Law ed. 1022; and *Leffinwell* v. *Warren* 2 Black 599, 17 Law ed. 261, wherein the Supreme Court of the United States held that:

> "The construction given to a statute of a state by the highest judicial tribunal of that state, is regarded as a part of the statute, and is as binding as the text upon the courts of the United States;"

and this rule applies as well to Congress and federal courts as to states and state courts. *Willis* v. *Eastland Trust & Banking Co.*, 169 U. S. 307, 42 Law ed. 752.

Therefore, on a demurrer to the evidence where the trial is to the court and not a jury, we submit the following Kansas cases which, according to the

above stated principle of construction, is binding on the courts of this state, *viz.: Wolf* v. *Washer et al.*, 32 Kan. 533, 4 Pac. 1036; *Chicago Lumber Co.* v. *Merrimack River Sav. Bank*, 52 Kan. 410, 34 Pac. 1045; *Farnsworth* v. *Clarke*, 62 Kan. 264, 62 Pac. 655; *Wehe* v. *Mood*, 68 Kan. 373, 75 Pac. 476; and *Kerr* v. *Kerr*, 80 Kan. 83, 101 Pac. 647.

In *Wolf* v. *Washer*, (1884) the court observed:

> "Upon a demurrer to evidence, the court cannot weigh conflicting evidence but must consider as true every portion of the evidence tending to prove the case of the party resisting the demurrer;"

and in *Farnsworth* v. *Clarke*, the court held:

> "In considering and deciding a demurrer to plaintiff's evidence in a case tried to the court, the same rule obtains as in cases tried to a jury. The court cannot weigh conflicting evidence, nor regard the case as though submitted by the defendant upon the plaintiff's showing, but must consider as true all portions of the evidence which tend to prove the allegations of the petition. *Wolf* v. *Washer*, 4 Pac. 1036, 32 Kan. 533."

In *Kerr* v. *Kerr*, the same court observed:

> "This case was tried to the court without a jury, but the same rule relating to demurrers to the evidence, obtains as is applied in jury trials. This point was directly decided in the case of *Wehe* v. *Mood*, 68 Kan. 373, 75 Pac. 476, where it was said: 'In considering and deciding a demurrer to plaintiff's evidence in a case tried to the court, the same rule obtains as in cases tried

to a jury. The court cannot weigh conflicting evidence nor regard the case as though submitted upon plaintiff's showing, but must consider as true all portions of the evidence which tends to prove the allegations of the petition.' See, also, *Farnsworth* v. *Clarke*, 62 Kan. 264, 62 Pac. 655; *Wolf* v. *Washer*, 32 Kan. 533, 4 Pac. 1036. It follows that, if there were any evidence tending to establish that the will was obtained by undue influence, the demurrer should have been overruled."

To the same effect as these Kansas cases are the decisions of the Supreme Court of California as shown in *Goldstone* v. *Merchants' L. & C. S. Co.*, 123 Cal. 625, 56 Pac. 776; and *Freese* v. *Hilbernia Sav. & Loan Soc. et al.*, 139 Cal. 392, 73 Pac. 172, and decisions therein referred to, where it is again held that on a motion for non-suit or demurrer to the evidence, the law is the same whether the case is tried to the court or to a jury; and in all such cases, where the evidence of the demurree even in the slightest degree sustains his right of action or defense, it is plain error to sustain the motion for non-suit or the demurrer to his evidence. The reasons for such decisions rest on sound legal principles, and there is no excuse for not knowing or understanding them. A demurrer to evidence presents a proposition of LAW—*not* of FACT; and courts are legally bound to dispose of it *as* a legal proposition, and are not permitted under the law to undertake to change it into matters of fact, unless there is a statute which

permits it. In Standard Ency. of Procedure, Vol. 7 page 9, the author observes:

> "The court does not in such a proceeding perform the functions of a jury. The facts are admitted, and the court applies the law to them and determines which party to the issue should succeed upon such facts. It is the duty of the court to consider as true every portion of the evidence tending to prove the case of the party resisting the demurrer, and not to weigh conflicting evidence, and the court in considering the demurrer cannot go into an investigation of the facts in dispute or attempt to reconcile conflicting or inconsistent testimony,"

citing a long list of decisions to support the text from the Supreme Courts of different states of the Union and of the United States.

To the same effect are the numerous cases hereinbefore cited in this brief; and for authority still more copious and to the same effect, see 38 Cyc pages 1541, 1542, 1543 and 1544, where numerous decisions from the Supreme Courts of the several states and United States are cited, among which are many decisions of the Supreme Court of Kansas from which our statute on procedure was taken, and the cases of *Shawnee Light etc. Co.* v. *Sears,* 21 Ok. 13, 95 Pac. 449; *Edmisson* v. *Drumm-Floto Commission Co.,* 13 Okla. 440, 73 Pac. 958, are cited as authority on this matter.

From this array of authority (and, in fact, many more such decisions could be furnished if need be),

it is apparent that any departure therefrom, on a demurrer to evidence, is purely arbitrary and unwarranted by the law, unless the legislature of the jurisdiction has first provided for such departure, and is not due process of law; for it is indisputable that such departure is not the "law of the land," except when first permitted by legislative authority. And, too, on a demurrer to evidence in a jurisdiction where such procedure presents a proposition of law, as it does in our jurisdiction, I deny the right of power of either the courts or legislature to so change that procedure, after a legal right thereunder has accrued and become consummated in the trial of a cause, that its legal force and effect become different or the reverse of what it was at the time of trial, and leads to different results from those guaranteed under the law as it existed when the right of action accrued and the trial was had. Cooley's Const. Lin., pages 410, 411. A vested right of action is property, and is equally protected against arbitrary interference, *Idem*, page 517; *Angel* v. *Chicago, M. & St. P. R. Co.*, 151 U. S. 1. No one has a vested right to a *particular mode* of procedure; but, at the same time no one can be deprived of a legal process by which his legal rights can be enforced, by the legislature or otherwise; for "when such legal rights springs from contract, or from the principles of the common law, it is not competent for the legislature to take it away," *Idem*, page 517, and numerous decisions there cited.

In *Green* v. *Biddle,* 8 Wheat. 1, 5 Law ed. ..... it was held by this court that:

> "It is no answer, that the Acts of Kentucky now in question are regulations of the remedy, and not of the right to the lands. If these acts so change the nature and extent of existing remedies as materially to impair the rights and interests of the owner, they are just as much a violation of the compact as if they overturned his rights and interests."

And, in *Edwards* v. *Kearzey,* 6 Otto. 595, 24 Law ed. 794, point 2, the same court citing this last decision and many others to the same effect, *held:*

> "The remedy subsisting when the contract is made is a part of its obligation, and any subsequent law of the state which so affects it as to substantially impair and lessen the value of the contract, is forbidden by the Constitution, and is void."

Nor is the essential nature of a cause of action changed by recovering judgment upon it, *Huntington* v. *Attrill,* 146 U. S. 657, 36 Law ed. 1123. Nor will the Federal Courts follow a sudden change of its decisions by state courts where the rights have been vested under the former line of decisions of that state court, *Kuhn* v. *Fairmont Coal Company,* 215 U. S. 349, 54 Law ed. 228; *Leob* v. *Columbia Township etc.,* 179 U. S. 472, 45 Law ed. 281; and where the rights involved in the case depend upon general jurisprudence, a federal question is involved, and the federal court may decide the case

according to its own notion of that law, regardless of the decision of the state court in that case or prior decisions, *Swift* v. *Tyson*, 41 U. S. 16, 10 Law ed. 865; *Burgess* v. *Seligman*, 107 U. S. 20, 27 Law ed. 359; *Baltimore R. R. Co.* v. *Baugh*, 149 U. S. 368, 37 Law ed. 772.

As above stated, our practice act was adopted from the State of Kansas, and the same may now be found in chapter 60, article 20, of the Revised Laws of Oklahoma; and section 5039 of said chapter provides:

> "*Provisions Applicable to All Trials.* The provisions of this article respecting trials by jury apply, so far as they are in their nature applicable, to trials by the court."

The fact of this adoption and several of the Kansas decisions above cited are referred to in the decision of the Supreme Court in this case and it is there pointed out that under the general line of decisions the court cannot weigh conflicting testimony, etc., upon a demurrer to evidence. But this section 5039, above quoted, is nowhere mentioned and referred to in that opinion but the same seems to have been entirely overlooked by said Supreme Court, as well as the trial court. We submit that this chapter and its prior constructions by the Supreme Court of Oklahoma, of Oklahoma Territory, and of Kansas, from which it was adopted, should govern these matters, and according to these decisions on a demurrer to evidence, the decision in the

case at bar would necessarily have been in favor of the plaintiff in error had they been followed. But, instead of that, said Supreme Court bases its affirmation of the decision of said trial court upon the following cases: *Lambuth* v. *Stetson & Post Mill Co.*, 14 Wash. 187, 44 Pac. 148; *Newberger* v. *Keim*, 134 N. Y. 35, 31 N. E. 268; *Bliven* v. *Robinson*, 152 N. Y. 333, 46 N. E. 615; *Hayward, Adm'r*, v. *Jackman*, 96 Iowa 77, 64 N. W. 667; *Powell* v. *Camaday*, 95 Mo. App. 713, 69 S. W. 686. We presume these authorities thus relied upon were taken from a note in 38 Cyc. on page 1560, where the author observed:

> "According to some decisions where the case is tried without a jury, on motion for non-suit or dismissal at the close of the plaintiff's evidence, the court should decide the motion according to the preponderance of the evidence. Other decisions, however, hold that the rules as to non-suit are the same where the trial is by the court or by a jury,"

citing as authority to this first sentence the case of *Haywood* v. *Jackman*, 96 Iowa 77, 64 N. W. 667; *Newberger* v. *Keim*, 134 N. Y. 35, 31 N. E. 268; *Lambuth* v. *Stetson & Post Mill Co.*, 14 Wash. 187, 44 Pac. 148.

But the text of the author does not accord with these decisions but is the reverse of them. By examination the court will discover that this Washington case cited is predicated upon the statute of the State of Washington requiring such cases to be tried *de novo;* and that the Constitution of the State

of Iowa requires chancery cases to be also tried *de novo,* when appealed to the Supreme Court of said state. These facts, in my judgment, render those two decisions from those states wholly inapplicable to the case at bar; and in this Washington case it is now my recollection that these New York cases thus cited in the case at bar, were referred to as holding the contrary doctrine from the Washington case, although, I do not now have access to this Washington case; and it is also my recollection that in a subsequent decision of the Supreme Court of Washington this *Lambuth* case was referred to and overruled, at least in part, and in which it was pointed out that such cases depended upon a Statute of Washington, but I cannot now give the particular case.

It has always been the law on a motion for a non-suit, dismissal and even on a demurrer to evidence that where there was no evidence at all to sustain the action, it should be dismissed on such motion or on a demurrer to the evidence. But, the court will observe that in the case at bar there was no "motion for a non-suit or dismissal at the close of the plaintiff's evidence," as so referred to in 38 Cyc 1560, to support which said decisions were cited by this author. Hence, again, these decisions would have no application to the case at bar. On the contrary, it is insisted that defendants in error requested judgment as prayed for in their answer (page 70 of the record). But, the court acted upon their

demurrer to the evidence, without mention or referring to this request; and decided the case on the demurrer of these defendants to the evidence thus adduced by the plaintiff in error; and we respectfully submit that the defendants in error are now bound by their demurrer to the evidence and the law that governs the same in the trial of this case, as shown and cited in this brief. We also respectfully show that these decisions relied upon by the Supreme Court of the state have no application to this case; but that this whole case before the trial court, as well in the Supreme Court of said state, is contrary to the law that governs the case and the respective Acts of Congress referred to in the record and in this brief.

Third Assignment of Error.

That said court erred in finding and holding that "the alleged marital relation between Ben Porter and Jennie McGilbra was not established by the proof and did not exist, either by reason of custom or the laws of the Creek Nation; that the relation was illicit; and the plaintiff, Nellie Porter, was the illegitimate child of this illicit relation," for, on a demurrer to the evidence it was not in the power of said court to so find such facts, and the finding of the same was in violation of said respective provisions of said respective Constitutions, and therefore void and inoperative as such findings of facts in the

case, and said judgment based thereon is likewise repugnant to said provisions of said Constitutions, and deprives the plaintiff in error of her property in said lands, contrary to said provisions and without due process of law, as thereby guaranteed by said Constitution, as aforesaid; that said judgment is not warranted by the general law of the land relative to demurrers to evidence, but is in direct violation of the same, and therefore, without the sanction of law, justice or right; that on a proper application of the law which governed said demurrer to the evidence so adduced on said trial to the evidence in said case, the judgment of said court would have been in favor of the plaintiff in error on a proposition of law alone, which was the only matter which could be legally determined on such demurrer; that on a proper application of law which governs a demurrer to evidence, the evidence adduced by the plaintiff in error amply showed a valid marriage between said Ben Porter and Jennie McGilbra, both according to the usages, customs and laws of said Creek Nation, and by the common law, which was in force in Indian Territory at the time of said marriage; that the common law was extended over said territory by Act of Congress of May 2, 1890, in section 38 of which the Creek customs, marriages and domestic affairs were guarded and protected; and said judgment is against both said customs and tribal marriages and common law marriages, thus sanctioned by Congress and in force when such marriage

was consummated, and deprives the plaintiff in error of such laws by so holding against the same in said judgment.

This assignment of error is practically the same as the Second Assignment of Error, and the authorities and decisions we here cite under this assignment would have applied as well to the Second assignment. It is our contention that a demurrer to evidence raises an issue in law, arising out of the facts established by the evidence adduced in the case, as shown by the authorities cited under the second assignment. That being our position, we have had embraced in the record in this case all the evidence taken on the trial, in order that this court may review that evidence *in toto,* and thereby be able to determine for itself whether upon said demurrer to the evidence the conclusion of law to be determined therefrom supports, or fails to support, the judgment rendered in the case at bar. And for the convenience of the court we hereafter set forth in this brief a large portion of that evidence and many decisions of this court and the Supreme Courts of many states of this Union, as to the law governing Indian marriages, setting forth many of these decisions *in haec verba;* and from these decisions, we respectfully submit that the decision in the case at bar is erroneous.

We will first call attention to the uncontradicted allegations of the plaintiff in error, before going into the evidence or the law governing the

case. In paragraph 2 of the petition, the plaintiff in error charges and avers "that after so living together as man and wife for the time aforesaid, said Porter and wife separated, and thereafter said Porter lived apart from his said wife, Jennie, until the time of his death; that neither said Porter nor his said wife, Jennie, ever obtained a divorce from the bonds of matrimony, nor was a divorce ever granted to either of them decreeing a separation of any kind, from the other; but they remained ever after said separation as man and wife, the same as before such separation, until the time of his death." In paragraph 4 of said petition, plaintiff in error alleges: "That said Porter and Lena were never legally and lawfully married to each other, and that said Jennie Porter, the wife of said Porter, is still living and was never divorced from said Ben Porter, as aforesaid." These are very positive and direct allegations and on very material facts to be proven and established in this case. Still, they are nowhere denied by the defendants in error, and therefore need no evidence in the case to support them. It is therefore shown without contradiction that Ben Porter and Jennie were never divorced; second, that Ben Porter and this woman, Lena, were "never legally and lawfully married." True, that in their answers filed in this case, they say that when Ben died, he was survived by "his wife, Lena," etc. But there is no allegation whatever that Ben and Lena were

ever married; nor is there a denial anywhere that they were "never legally and lawfully married," or that Ben and Jennie were never divorced from each other. It follows, therefore, as fully established that this woman, Lena, was not the wife of Ben Porter at the time of his death. That being the case, she had no right, title or interest in the lands and her pretended deeds therefor were absolutely void for this reason alone. Besides, it is alleged in paragraph 6 of said petition, that Nannie Broadnax and Lena Freeman were full-blood Creek citizens, and so enrolled. Here, again, there was no denial of these facts so alleged, and they are now established beyond dispute. It, therefore, follows that neither Nannie Broadnax nor Lena Freeman could make a deed or alienate their lands or any interest therein, and the pretended deeds made in this case to the defendants in error are absolutely void. It is also alleged that Sam Porter was a Seminole Indian, and so enrolled, and that Ben Porter died on about the 23rd of November, 1906. These charges are not denied in the answers. Consequently, they likewise need no further proof, but are conclusively established. Under Section 6 of the Supplemental Creek treaty, it is provided in effect that none but a Creek heir can inherit from a Creek citizen, so long as there is a Creek heir to take the estate. This supplemental treaty went into effect on the 8th of August, 1902. It again follows that Sam Porter was not an heir of

Ben Porter under any circumstances, and took nothing whatever in the lands in controversy, and his deeds were also absolutely null and void, because it is admitted that Nannie Broadnax was an half-sister to Ben, and was a fullblood Creek citizen, and in the absence of the daughter of Ben would have taken the lands in controversy; and it was so held by this court in *Washington* v. *Miller*, 235 U. S. 422, 59 L. ed. 119.

But notwithstanding the fact that each and everyone of these deeds so made by Sam Porter, Nannie Broadnax and Lena Freeman were absolutely null and void, for the reasons I have pointed out, the court below gave the defendants in error the lands on the strength of said deeds, and attempted to "forever quiet" the title thereto. But it may be said that these pretended deeds of Nannie Broadnax and Lena Freeman were approved by the County Court of Hughes County, and the lands thereby became alienated to the Wilsons; but to this we suggest that said court had no right, power or authority to approve said deeds, because Ben Porter died in November, 1906. His lands, therefore, passed to his heirs subject to the restrictions placed upon it under both the supplemental treaty and the Act of Congress of April 26th, 1906, which made inherited, full-blood heirs' lands inalienable without the approvel of the Secretary of the Interior, as held by the Supreme Court of the United States in *Western Investment Co.* v. *Tiger*. The

Secretary never approved any of these deeds, and consequently they are all void for the reasons we have mentioned. I submit that on this ground alone the decree in this case is erroneous and plainly wrong, and that the plaintiff in this case has a right to contest this point, not only because she is the child and legitimate heir of Ben Porter, but because she, as such heir, claims possession of said lands under said Thornburg, to whom her father had leased said lands in October before he died, for a period of five years. The tenant's possession is her possession and no attornment could be made by him to her prejudice. (See Sec. 4088 of Snyder's Code.)

In my judgment, this shows that the defendants in error have no right, title or interest in said lands, and that said deeds are absolutely void for all purposes whatsoever. It follows, then as a matter of course, that the decree in this case decreeing said lands to the defendants in error, is also erroneous, and has neither evidence nor title upon which to stand, and should be reversed in favor of the plaintiff in error.

This being a decree based upon a demurrer to the evidence, the next feature in its natural order would be a consideration of the law governing a demurrer to evidence.

In *Cole* v. *Missouri, K. & O. R. Co.*, 20 Ok., 227, point 2, this court held:

"When there is any evidence introduced at the trial of a cause reasonably tending to establish the allegations of plaintiff's petition, it is error for the court to sustain a demurrer to such evidence and render judgment in favor of the defendant."

In *Ziska* v. *Ziska*, 20 Ok. 634, that court held:

"A demurrer to the evidence admits all the facts which the evidence in the *slightest degree* tends to prove, and all the *inferences* or *conclusions* which may be reasonably and logically drawn from evidence. On a demurrer to the evidence the court cannot weigh *conflicting evidence*, but will treat the evidence as withdrawn which is most favorable to the demurrer." (Italics are mine, for I desire to use and refer especially to this case hereafter in connection with the presumption and proof of marriage and the legitimacy of issue born of that marriage between Ben Porter and Jennie McGilbra.)

This same legal principle was again reaffirmed by this court in *Shawnee Light & Power Co.* v. *Scars*, 21 Ok. page 19, where Justice DUNN in delivering that opinion quoted the above syllabus.

In *Conklin* v. *Yates et al.*, 16 Ok. 266, it was held:

"Upon a demurrer to the evidence, the court must consider as true every portion of the evidence tending to prove the case of the party resisting the demurrer and cannot weigh conflicting evidence.'

In *Coon* v. *Atchison, T. & S. F. Ry. Co.* 89 Pac. 682, the Supreme Court of Kansas held:

> "On a hearing of a demurrer to plaintiff's evidence, the court cannot weigh conflicting evidence, nor regard the case as though submitted by the defendant upon the plaintiff's showing, but must consider as true all portions of the evidence which tend to prove the allegations of the petition. *Wolf* v. *Washer*, 4 Pac. 1036, 32 Kan. 533; *Farnsworth* v. *Clark*, 62 Pac. 655, 62 Kan. 264; *Acker* v. *Norman*, 84 Pac. 531, 72 Kan. 586."

In *Jones* v. *Adair*, 91 Pac. 78, the same Supreme Court held:

> "On a demurrer to plaintiff's evidence, the court may not weigh conflicting testimony or *disbelieve and disregard* that offered in his behalf which tends to sustain his cause of action."

Here the Supreme Court of Kansas not only holds that conflicting evidence must not be "weighed," but goes still farther and holds that the plaintiff's evidence must not be "disbelieved" or "disregarded" which perhaps is no stronger than the decision of the court in the above cited cases.

In *Edmisson* v. *Drumm-Flato Com. Co.* 13 Ok. 440, it was held:

> "A demurrer to the evidence admits all the facts which the evidence in the slightest degree tends to prove, and all the inferences or conclusions which may be reasonably and

logically drawn from the evidence." 2. "On a demurrer to the evidence, the court cannot weigh conflicting evidence, but will treat the evidence as withdrawn which is most favorable to the demurrant."

This, of course, was a case involving the marriage of Ben Porter and Jennie McGilbra. It is alleged in plaintiff in error's petition that they were married about the year 1893; and lived together as husband and wife about one year and one half; and of that marriage the plaintiff in error was born and is the legitimate child of Ben Porter and Jennie McGilbra. All this, in effect, is denied by the several answers of the defendants in error, and as affirmative matters they set up those numerous deeds I have referred to. These are really the issues in this case, but it appears to me we have already shown the deeds were absolutely void, and need no further consideration. I would go further on the validity of such deeds, but consider that a minor point in the case so far as the plaintiff in error is concerned; for if she is the legitimate heir of Ben Porter, the lands belong to her, and none can dispute it. But I insist these deeds are void for the reasons already assigned. The Attorney General held that where the ancestor died before the passage of the Act of Congress of May the 27th, 1908, the County Court has no jurisdiction to approve a deed for his lands. That is what was attempted in this case; and I insist

the deeds are void, and the court below had no power to decree these lands to the defendants in error on such void deeds as the only basis therefor. If the deeds are void, then of course that decree forever decreeing them the lands, is clearly erroneous.

But, in my judgment, the gist of this case hinges upon that marriage between Ben Porter and Jennie McGilbra, and the legitimacy of the plaintiff in error, and thereby her right to the lands in controversy. To these features, this brief will now be addressed. Practically all the testimony taken in this case was respecting these features; but we can not set it all out in this brief, but will go far enough to show the application of the above decision. The said Jennie McGilbra is now Jennie Washington and whose testimony appears on pages 34 to 38 inclusively. She is a Creek citizen; and unable to speak or understand the English language. On page 35 she is asked:

> "Have you any children, and, if so, what are their names? A. Yes, sir; I have a child named Nellie Porter. Is Nellie Porter the plaintiff in this suit? A. Yes, sir. Who is the father of Nellie Porter, the plaintiff in this suit? A. Ben Porter. Is Ben Porter, the father of Nellie Porter, the plaintiff in this suit, living or dead? A. Dead. State if you know when Ben Poretr died? A. I don't know the date. Were you and Ben Porter ever married? A. Yes, sir. Was the Ben Porter to whom you

were married the father of Nellie Porter, the plaintiff in this suit? A. Yes, sir. When were you and Ben Porter married, about what time? A. About 1895. How long did you and Ben Porter live together after you were married? A. Over a year. How old are you? A. Twenty-five she said. How old were you when you and Ben married? A. I was about sixteen. Where were you when you and Ben were married? A. Okmulgee. What was going on at that time? A. Creek Council. How did you and Ben happen to marry? A. Well, we just married according to the Creek laws. What did Ben say to you and what did you say to Ben? A. He asked me to marry him. And what did you say in answer to that? A. I consented and told him alright. Where was that he asked you to marry him and you consented? A. At Okmulgee. At the Council? A. Yes, sir. Did you consent as soon as he asked you to marry? A. Yes, sir. What did you and Ben then do, where did you go? A. We went to Ben Porter's mother's place. When did you go, that day or some other day? A. The same day. Where did you stay that night of that day you and Ben were married? A. At Ben Porter's mother's house. How long did you and Ben stay together there at Ben's mother's after that night? A. Over a year. Did you and Ben sleep together the first night after you went to Ben's mother's, after you were married at the Creek Council? A. Yes, sir. Did you and Ben ever go around together very much after you were married? A. We used to go to Okmulgee. Together? A. Yes, sir. Did Ben recognize you all this while as his wife to other people? A. (Here was an objection and the witness did not

get to answer). Was Nellie born before or after you and Ben separated? A. After we separated. How long after? A. About three months after. Was Nellie begotten by Ben Porter while you and Ben Porter lived together as man and wife? By the Court: 'She has already said it was Ben's child and it must have been during that time.' By Mr. Lawson: Why did you and Ben separate? A. He was living with another woman. Took up with another woman. By the Court: 'Was he living with the other woman when Nellie Porter was born?' A. Yes, sir. Had Ben Porter lived with any other woman before you and he were married? A. No, sir. I don't think he did. Had you ever lived with any other man before you and Ben were married? A. No, sir. By the Court: When did Ben die? A. In November, 1906. Mr. Lawson: That is all."

As conflicting evidence can never be considered by the court on a demurrer to the evidence, we could stop here with this witness without the cross examination; but as there is no conflicting statement in that cross examination, we give it also, which is as follows:

"By Mr. Moore: You lived at Eufaula before you went to Okmulgee at the time you say you and Ben were married? A. Yes, sir. How soon after you went from Eufaula to Okmulgee until you and Ben were married, or went to living together? A. About two days after I got to Okmulgee. Then after you and Ben separated, you went back to Eufaula? A. Yes, sir. By Mr. Moore: That is all."

Here is the uncontradicted testimony of the mother of Nellie Porter, showing that, about 1895, she and Ben Porter were married—she says emphatically they were married and no one contradicted it; that he asked her at the Council at Okmulgee to marry him, and she consented and went right on to the home of his mother's, slept together that night, stayed there over a year, went to Okmulgee together as husband and wife at different times; and that Ben was the father of this child Nellie who was born about three months after they separated, and they separated because he "took up with another woman." This would constitute a common law marriage any where among English people where English laws existed. No one denied this; but had they done so, it could not be considered on this demurrer to the evidence. That deposition is conclusive within itself of all facts necessary to establish this marriage and the legitimacy of Nellie Porter; and in my humble judgment, is sufficient to reverse this whole decree and give these lands to the plaintiff in error. The defendants in error moved the court to strike this deposition on the ground that it showed no "marriage at all in conformity to the law;" but the court overruled the motion, thus holding it competent on the trial of the case.

Robert Thomas is next called as a witness, page 38, and after stating he was about fifty years old, lived with the father and mother of Ben Porter and buried them, been in this country about twenty-

three years about Okmulgee, and knew Ben Porter since 1889 on up to the time of his death, stated as follows:

"Did you see Ben Porter and Jennie McGilbra living together? A. I didn't see them living there; I seen them bring the child there. Nellie Porter, you mean? A. Yes, sir. Well, whose child is Nellie Porter? A. At that time Jennie McGilbra claimed to be the mother of it, and Ben Porter the father of it. Did the father and mother claim it was their child? A. Yes, sir. Which one said that? A. Ben told me it was his. Did you hear any one else say so? A. I hear his mother say it was Ben's. How long did the little child stay there with its grandmother? A. It was there two or three days to the best of my knowledge. I didn't live in the yard with them, I lived off a little. Did you know how long Ben Porter and his wife lived there with his mother? A. No, sir; I really don't know. Did they live there at all? A. They was there; stayed around there I don't know how long. I saw them there. I saw the child there and Ben was in and out all the time. * * * Do you remember about what time Ben Porter and Jennie McGilbra were married? A. To the best of my knowledge they must have went together somewhere probably between 1897 and '96. I havn't got directly the date, it was somewhere along there to the best of my knowledge; it has been so long since it occurred. After they come together, how long did they live together? A. I don't know. Well, Robert, are you acquainted with the Creek customs and usages of marriage that was in force among the Creeks at the time you was living there?

A. At that time there was a mutual agreement between the two, it was considered legal, and they went together and lived together without any ceremony or license at that time. Just took up with one another? A. Yes, sir; the Creek law did not prohibit it. Did you ever hear Ben Porter say anything about whose child Nellie was? A. He told me it was his child. He said he was the father of it, that is about all I know. Did you hear anyone in the community around there say whether Ben and Jennie were married, and if so, what did they say? A. They called them man and wife by mutual agreement. Was Ben and Jennie considered man and wife at that time? A. That was under mutual agreement. By the neighbors? A. Yes, sir; and the people in general.

Cross Examination by Mr. Moore.

Are you the same Robert Thomas that testified before the department at Okmulgee in this matter several months ago? A. I am. You know about as much about it now as you did then? A. I guess I do. Are you the same man that stated at that time that you was present at Mary Porter's when this baby was born? A. No, sir; I didn't make that statement. By Mr. Moore: That is all.

Re-Direct Examination.

Are you acquainted with Charles Wilson, one of the defendants in this case? A. Yes, sir. Did he ever offer you any money in the case to testify? A. He said, 'If I would get straight on the case, we would come together easy.' Who did? A. I and him in court. What did he mean by that? A. I don't know what he meant by that. He said if you would

get straight? A. Yes, sir. What did he mean? A. He wanted me to get the dates and give to him in writing concerning the matter, and we was out of court and I didn't feel under obligation to do that. Isn't it a habit in getting evidence in cases of this kind, to get affidavits and introduce them in court? A. I couldn't answer that question. Was he wanting you to make affidavit to that? A. To the dates, Your Honor. You wouldn't do it? A. I couldn't do it. That is all. By the Court: You say you was in there when the child was born? A. No, sir; the child wasn't born on the place where I was living, it was born down near Eufaula and brought up there. You say Ben told you it was his child? A. Yes, sir. We were guying him and told him he was mighty young to start out with a family, and he says, 'A young cat likes cheese as well as an old one, and it is mine just the same.' Do you talk the Creek language? A. No, sir. He could talk English? A. Yes, sir. He went to school all the time. In speaking of it was the child there at his mother's house? A. Yes, sir. Was the mother of the child there at this time? A. I would not be positive. The child was there a day or two but I did not see the woman. How old was the child at this time? A. I am unable to answer that question; it was a baby I could not tell what age. Was it two or three months or a year old? A. I don't guess it was a year old; it was a good big sized child. What did he say about the mother of the child, did he talk about girl as his wife? A. He says this, 'I have got a wife.' The Indians called it 'custom wife.' What did he say? A. When we got to telling him about it he says, 'I had just as well marry as any-

body.' Where was he living at that time? A. Ben Porter? Yes? A. He was up at his mother's, but he was living down about Eufaula and come up. Who was he living with? A. I don't know, I could not answer that question. You say he was married? A. He called her his wife. You don't know whether he was talking about this woman or not? A. Bound to be talking about her, when we were talking about the child and he told us, 'A young cat likes cheese as well as an old one.' How come you to be teasing him about the child? A. I had known him from a school boy and he had run off and had this child, and it got quiet and he came back to his mother's and we was out at the barn from the house. How old was he at that time? A. Oh, I have no idea. Well, about how old? A. I guess at that time he might have been about fifteen or sixteen. He was a long legged boy. He wasn't grown? A. No, sir; he wasn't grown. You never saw him in company with the woman at his mother's house? A. No, sir; never saw him carry her anywhere. Was that the only conversation you had with him about the woman? A. He went back and I never saw him any more until he was arrested. By the Court: That is all."

Here the witness states that Ben was sent to the penitentiary and stayed three years, etc. Then on cross examination, stated further:

"By Mr. Moore: At the time you had this conversation with Ben about the child and about this woman having been his wife, that was just after Jennie had left? A. I don't know whether she had left; the child was there. That

was after Jennie went to Eufaula? A. I don't know; the child was in the house. I seen the child in Mrs. Porter's arms, that is the reason I know it. By Mr. Moore: That is all. By Mr. Lawson: The mother of the child might have been in the house for all you know? A. That is what I saw; I wasn't in there. By Mr. Lawson: That is all."

John Lowe is next called, and after telling he was a first cousin to Ben Porter, he was asked:

"By the Court: Did you ever have a conversation with Ben Porter about his child or any of his children? A. There was one child but I don't know its name; he said it was his. Did he tell you who the mother of the child was? A. Yes. Who did he say its mother was? A. Jennie McGilbra was its name. By Mr. Lawson: Did you know Ben Porter's mother? A. Yes, sir. What was her name? A. Mary. Did you ever hear Mary Porter say anything about Nellie Porter this child? A. She told me it belonged to Ben; that is all she ever told me. * * * About when was it that Mary told you that? A. I don't know when that was. I think it was somewhere along about eighteen—between '95 and '96. By Mr. Lawson: That is all."

Mary Grayson was next called, and asked:

"Did you ever have any conversation with Ben Porter about Nellie being his child? A. No, sir. Did you have any with his mother? A. Yes, sir. What did Mary, his mother, tell you about Nellie? A. She had a little child about a year or a year and a half old, and she said that was Jennie McGilbra's child that was

claimed to be Ben Porter's child, that Ben Porter was the father of this child. About when did Mary Porter tell you this? A. In 1896. How long after that till Mary Porter died? A. She died in '07 in the winter. By the Court: How old was the little child at that time? A. About a year or a year and a half old. At that time? A. Yes, sir. Was the little child there with the grandmother at this time? A. She had it. You saw the child? A. Yes, sir. Do you recollect what they called the child? A. No, sir; they never called no name at all. How was it among the Indians at that time, did they name the children as soon as they were born, or did they let them go? A. Some of them named them and some didn't By Mr. Lawson: Mary, did you know Jennie McGilbra, the mother of that child? A. Yes, sir. Did you know her reputation for chastity in the community in which she lived at that time? A. No, sir; never heard anything about her at all. Never heard anything against her? A. No, sir. Did you know a woman over there called Big Nellie? A. Yes, sir. Did Jennie ever live there at Big Nellie's? A. Not that I know of. (Mary Grayson was the interpreter before the Indian agent at Okmulgee in this matter, see page 107). By the Court (page 107): You say you are a member of the Muskogee Tribe of Indians? A. Yes, sir. Lived here all your life? A. Yes, sir. What was the custom of the Indians with reference to the wife taking the husband's name, did she take his name or not? A. Yes, sir. Since 1890 has that been practically the universal custom, or is there frequently cases where the woman does not take the husband's name? A. Sometimes they don't. When

they would have anything to do around the Court House they would ask them who their husband was. What is the custom among themselves with reference to the wife being called by the husband's name? A. They hardly ever went by the husband's name before the Dawes Commission made the rule. Along in 1903 and 1905? A. It was about half and half, some went by their husband's name, some didn't. By the Court: That is all. (She was recalled, page 112, and further testified:) Do you know how Ben Porter and Nellie McGilbra were regarded in the community where they lived, whether they were man and wife or not? A. Just around in the community they spoke as though she was his wife. The people spoke of them as man and wife? A. Yes, Jennie as Ben Porter's wife.

Cross Examination by Mr. Moore.

What community do you mean? A. Around Okmulgee and Caseettha Town. Jennie wasn't around there much? A. I don't know how long she was there. Did you ever hear anybody say they was husband and wife, that they were married? A. No, sir; I never heard anybody say they was married. They spoke of them as if they were husband and wife? A. Yes, sir. By Mr. Moore: Who did? A. It was just commonly known as you would know of a freight train wreck on the track; nobody never come to me and told me they were married. By Mr. Lawson: As a matter of fact they spoke of them and treated them in the community where they lived as man and wife? A. I don't know anything about the treatment. I heard them speak of Jennie McGilbra as being one of Ben

Porter's wives. By the Court: Did you know of his having anything to do with other women? A. He was living with some woman all the time after he was any size at all. Do you know whether he lived with any other woman before he took up with this woman? A. I don't know that he did. Did you know of him living with any other woman after they separated? A. I don't know whether they separated or not; she claimed that was the reason she went home because he had another woman. Do you know who the other woman was? A. Lena Porter. How long did he live with her? A. Several years, off and on. Do you know whether they went through the marriage ceremony? A. I don't think they did. Was any children born to them? A. I don't know; she is here. By the Court: That is all."

Bettie McIntosh, called for plaintiff in error, says:

"Did you ever have any conversation with Mary Porter or Ben Porter about whose child Nellie Porter was? (page 108) A. Ben's mother told me it was a child claimed to be Ben's. When did Mary tell you that Nellie was Ben's child? By the Court: She has not identified the child by the name of Nellie Porter. By Mr. Lawson: When did Mary tell you this? A. About 1897 she told me, while she was in good health, she died in 1907 I think. Where was the child about whom she was talking at that time? A. She told me that Jennie McGilbra had a child by Ben. Did she tell you what the child's name was? A. No, sir. Where was the child when she was telling you this? A. The child was at her mother's. * * * Where was

Jenine McGilbra at that time? A. She was living down about Eufaula. * * * By the Court: Had you heard that they were married, that Ben and Jennie were married, had you heard that anywhere before that? A. I saw Jennie McGilbra at Mary Porter's. By the Court: Stand aside."

William Sullivan is the next witness who testifies:

"Did you know John Porter and Mary Porter, the father and mother of Ben Porter? A. Yes, sir. Are you a member of the Creek tribe? A. Yes, sir. How long did you know John and Mary Porter? A. I have known them since thirty years ago. * * * Did you know Ben Porter, the father of Nellie Porter? A. Yes, sir. Is Ben Porter living or dead. A. Dead. Did he have any children? A. I know of one. What is her name? A. Nellie Porter. Who was Nellie Porter's mother? A. Jennie Washington. What was Jennie Porter's other name? A. Jennie Porter. Was Ben Porter and Jennie married, if so, when? A. I never seen them get married, but I have seen them together according to the custom and I thought they was man and wife; it was in about the year 1894 when I saw them. How was Ben and Jennie regarded in the community in which they lived, as man and wife or not? A. They was considered as man and wife. Do you know where Nellie Porter was born? A. 1895 I think. How long did Ben and Jennie live together as man and wife? A. *Pretty nearly two years.* (I underscore this answer for it is corroborative of Jennie in her testimony and shows that if this was an illicit connection it was surely kept up

a long time, and so long that it had ripened into a marriage according to the testimony in this case). Was Nellie born before or after they had separated? A. The baby was born at Jennie's mother's place. Was it after the separation or not? A. Yes, sir. I think it was. After the baby was born she went back to Okmulgee. Back to the home of Ben Porter? A. Yes, sir. Jennie's mother lived down about Eufaula, did she not? A. Yes, sir. And Nelhe was born down there, was he not? A. Yes, sir. Ben and his mother lived up close to Okmulgee, did they not? A. Yes, sir; she went up there and lived awhile and they separated and she came on down to Eufaula. Did you ever have any conevrsation with Ben about him and Jennie being married? A. No, sir; we have had conversations but not on that subject. Did Ben ever tell you anything about Nellie being his child? A. Yes, sir; he told me he had a child, but he didn't say what child. Did he say who the child's mother was? A. No, sir; but I just had an impression it was Jennie because she was living with him.

Cross Examination.

(After testifying he was 54 years old, been in penitentiary for selling whiskey [a very common offense those days], twenty years ago, and the marriage of Jennie, etc., the examination continued, and he said, page 119): You stated awhile ago after this child was born, Jennie went back to Okmulgee and lived with Ben Porter, didn't you? Yes, sir.

Re-direct Examination.

By Mr. Lawson: Did you know the reputation of Jennie McGilbra in the neighborhood

in which she lived at that time, or lives now? A Yes, sir, I know it; I never heard anything out of the way as I know of. How long have you known Jennie, the mother of Nellie? A. I knew her ever since she was a child. I know the whole family; there is several other brothers and sisters."

Roley Alexander is next called. After stating he was about thirty-one, and a Creek Indian, he was asked:

"Did you know Ben Porter? A. Yes, sir. How long had you known Ben Porter before he died? A. I don't know how long it was, but I have known him since he was a little boy; we used to go together. Did you know Jennie McGilbra? A. Yes, sir. Was Ben and Jennie ever married? A. I don't know whether they were married or not, but they used to come to our house together and go back—back and forth. Do you mean come to your father's house? A. Yes, sir. How far was it from your father's house to where Ben and Jennie lived? A. About a mile and a half north from my father. Did Ben and Jennie come to your father's house together? A. Yes, sir. Now, about when was this that they kept coming to your father's house? A. I don't know what time it was. Did they have any children? A. No, sir; not at that time. Did they have any children after that time? A. Yes, sir; he told me they had one. Who told you? A. Ben Porter; it was down at Eufaula. * * * Did Ben tell you what the name of the child was? A. No, sir; he just told me that he heard a child was born for him down at Eufaula; he hadn't

been down but he was aiming to go. * * * Did Ben tell you who the mother of the child was? A. Jennie. Was that Jennie McGilbra? A. Yes, sir. Where were Ben and Jennie living at the time you say they was coming to your father's house? A. They were living at a house that father had built; that Ben's father had built. Was they living with Ben's father and mother at that time? A. Yes, sir. How long did Ben and Jennie live with his father and mother? A. About a year. At the time Ben and Jennie were coming to your father's house, was they regarded in the community there in which they lived as husband and wife, or otherwise? A. I don't know what the community thought, but he told me himself that they was man and wife; that he had married her."

On cross examination he was asked:

"And you told up there that Jennie was cooking there for Mary? A. I was told by a work-hand that she was just to cook there, but Ben Porter himself told me that she was his wife; we lived there close and she used to come to our house often. Was Ben a small, slim, puny boy at that time wasn't he, Roley? A. He was a healthy good boy.

Re-direct Examination.

Do you know Chas. Wilson one of the defendants in this case? A. Yes, sir. After you testified at Okmulgee, did Charles Wilson give you any money? A. He gave me two dollars. When did he give you the two dollars? A. After I got my subpoena. And it was the subpoena in this case was it not? A. Yes, sir. At the time he gave you the two dollars he had

been talking to you about what you knew in this cause, hadn't he? A. No, sir; he just asked me if I was going and I said 'yes' and he handed me the two dollars. Going where? A. Here to this town. * * * You was summoned as a witness for the plaintiff, wasn't you, not for Wilson? A. I don't know, I just got the subpoena."

John Goat is next called to prove the custom and usages of the Creeks as to marriages among them, and testified: "Did the Creeks have a custom or usage of marriage between 1890 and 1898 and 1899? A. Why they didn't have no law at this time, but somewhere along in '82 I think the council passed an act relative to marriage. By the court: What was the custom, was a marriage between Indians entered into simply by consent and by agreement and without witnesses considered legal after the Council passed that act fixing the way for them to marry? A. There was some cases where parties went together and lived together and done well, there was nothing said about it, but where a man was kindy mean and didn't treat his wife right, there was a good deal of talk about it. That is not the question. Was it considered legal for them to marry simply by agreement and consent without going through any ceremony and without any witnesses after that Act was passed? A. He said where the parties went together and they had children and one of the parents had property, they would recognize the child where the parent would

die, and let them have some of the property in some cases." (He, Goat, says he was once a Creek District Judge and was about 67 years old.)

Barney Tiger is next called and said: he was over fifty, lived during his life right at the town, a member of the Creek tribe, whereupon counsel for plaintiff in error suggested that the court would take the witness; but the court observed: "My mind is made up with reference to the custom from the testimony and from my knowledge of the people; it is impossible to break up by legislation the custom of centuries." Anyway the witness was asked:

> "Are you acquainted with the Creek customs and usages and marriages that was extant, in existence in the Creek Nation along about 1895? A. I cannot understand you. By the Court: Mr. Interpreter, go ahead and ask him. A. Yes, sir. Under those customs and usages was it competent and proper for the Creeks to go together as man and wife just by mutual consent? A. Yes, sir. Was the children of such marriages deemed legitimate according to the Creek laws and customs? A. Yes, sir. By Mr. Lawson: That is all. By Mr. Walker: That is all."

Here is an open declaration of the court itself that its mind is made up on the custom from the evidence and his own knowledge of the people; and that it is impossible to break up by legislation *"the custom of centuries."* John Goat, the ex-Creek district judge, says in effect that it was lawful under

their customs for man and woman to take up with each other and live together and thereby became man and wife, and if one had property and died, the children were allowed to have some of it, etc. Barny Tiger's testimony was a great deal stronger. He says such marriages were valid under such marriages; that marriages could be made by them simply going together and living together; and their children were deemed legitimate. These few witnesses on these customs was enough; for we all know independently that such marriages were practically always resorted to by these people; but on this same subject we still have the testimony of John Jacobs and Johnson E. Tiger, as well as the statements of Sullivan and Robert Thomas heretofore given. Johnson E. Tiger, after testifying that he was 36 years old, the son of the Creek Chief and guardian of the plaintiff in error, says:

> "Are you acquainted with the Creek custom of marriage along about 1895? A. Yes, sir. What was the custom, if they had one, Mr. Johnson, if they had one as to marriage, about 1895? A. They lived together by common consent as man and wife; in most cases that was the custom as to full-bloods. How were the children of such marriages regarded, legitimate or illegitimate? A. They were considered legitimate of a common consent man and wife. To what extent did that custom and usage apply in the Creek Nation at that time and before that? A. It was generally applied in the Creek Nation. About what per cent, do

you suppose of the marriages of that time was consummated under this custom and usage? A. Oh, I would say seventy-five or eighty per cent. I will ask you, Mr. Tiger, according to the customs and habits of the Creeks, after they were married, in whose name did they go; in the name of the husband, or in her own name? A. In most cases, the wife usually retains her own name; even though the husband had a surname, the wife usually had just one name. It appears frequently on the Dawes Commission rolls now. * * * How old is Nellie now? A. She is about fourteen years old."

On cross-examination he is asked: "You say about seventy-five per cent of the marriages were not solemnized but by just taking up together; *do you mean that was the way after the passage of this Creek law?* A. Yes, sir." (I emphasize this because it was contended in the answer of the defendants in error that this Creek provision set up in their answer was all the law there was to marriages; and here put a specific question right on their grounds of contention, but got an answer to the very reverse of their own contentions, and that, too, from the son of the present Chief of that Nation. This is nowhere denied by any one and stands there as the law governing this case.) Again he is asked: "Have you in mind a case where a marriage was said to be had according to usage and custom where it was questioned? A. I don't know of any time when such a thing was as that was questioned. Do you know of a time since '91 where it was followed—that is a

child born of wedlock that was solemnized by usage and custom, do you know of a case—that is, an identical similar case to this in the Creek Nation? A. I don't know of any case like it that occurred in the Creek Courts. Then you cannot say that is the custom since the passage of this act, can you? A. Well, I would say there was no disputes to the issue so as to make one know of a specific instance; they usually inherited the estate of their father." Here we have it again, not only of the validity of the marriage by the customs, but likewise the legitimacy of the children and that "they usually inherit the estate of the father." No one again ever denied that statement; and it would not have amounted to anything even had it been denied, as this is before this court on a demurrer to the evidence.

Commencing with page 31, may be seen the testimony of John A. Jacobs, called on behalf of the plaintiff in error. After stating that he was 38 years old, was a native Creek citizen and lived here all his life, he was asked: "Are you acquainted with the customs and usages of the Creek Tribe and members of the Creek Tribe as to marriage? A. Yes, sir. By Mr. Walker: We object, it has not been proven that they had any usage or custom. By the Court: They had some. Answer the question, overruled. How long had you known of those customs and usages? A. Ever since I was about twenty years old. Mr. Jacobs, please state to the court what were the usages and customs prevalent among

the Creeks and in the Creek Nation relative to marriage? (Here is a string of objections, exceptions, etc.) * * * A. Part of the time they followed the custom from 1890 to 1898, but I think it was in the year 1887, if I am not mistaken, the Creek Council passed an act legalizing all marriages—that is, where they were living together as man and wife. In that law they made three ways of legal marriage —by a District Judge, an Ordained Minister or two witnesses to the contracting parties. You are speaking now of the laws now that was made. What about the customs and usages? A. *Well, the law did not prevent the custom.* What was that custom? A. Well, they would go together— * * * * They would take up one another and live as man and wife. According to those customs, was that regarded in the Creek Nation a. a legal, valid marriage? If they was recognized it was, but in plural marriages, the first one he took up with was his legal wife. (Here, no one ever disputed this testimony and the whole record that Jennie McGilbra was the *first wife* of Ben Porter—hence the only legal wife.) What about the children of such marriages as that, was they regarded as legitimate or illegitimate? They were regarded as legitimate children, except the second wife. (Nellie Porter is the child of the *first wife.* Hence again, she comes directly within these provisions, and according to this witness' testimony, Nellie was unquestionably legitimate. No one ever disputed this. No one is disputing it now; but it

stands conclusively established by this witness and, in fact, many other witnesses.) You say those customs and usages prevailed from 1890 to 1898? Yes, sir. In the Creek Nation? A. Yes, sir." (Here again, we have the usages and customs again fully established, and existing right in the Creek Nation from 1890 to 1898, covering the very period when Ben and Jennie were married and this child was born. This is established by the Creek members themselves, testifying not only as to this act of the Council, but that even with the act passed, the custom still prevailed, was in force and resorted to by 75 per cent or 80 per cent of the citizens of that Nation.)

On cross-examination, Mr. Jacobs was asked about this written act of the Council twice, to which plaintiff in error each time objected for the reason the act did not prohibit the custom or marriage in some other manner, but each objection was overruled, to which plaintiff in error excepted, as may be seen on page 81. He was also asked by the defendant in error this very significant question, which I hope the court will not overlook in passing upon this case, namely: "Now, after the passage of this act, Mr. Jacobs, was it not incumbent upon citizens getting married lawfully to comply with that act? A. NOT NECESSARILY." The witness had already stated that the custom still existed *after* the act passed; that it was passed to prevent plural marriages (not marriages by custom and

usage of the Creeks); that marriages by custom were valid and their issue legitimate; and that this custom still continued from 1890 to 1898.

I have thus gone through this evidence and culled out what I think applicable to the matters before the court, and some things that might appropriately have been left out, as we can consider only the evidence which tends to prove the allegations in the petition and such inferences and deductions arising out of such testimony. All conflicting evidence on a demurrer to that evidence in the case, must be considered waived by the party demurring. Not only that, but in *Jones* v. *Adair*, 91 Pac. 78, the Supreme Court of Kansas held: "On a demurrer to plaintiff's evidence, the court may not weigh conflicting testimony," but must not "*disbelieve* and *disregard* that offered in his behalf which tends to sustain his cause of action." As before stated, this court held in *Ziska* v. *Ziska*, 20 Ok. 634, that "A demurrer to evidence admits all the facts which the evidence, in the *slightest degree* tends to prove, and all the *inferences or conclusions* which may be reasonably and logically drawn from the evidence. On a demurrer to the evidence, the court will not weigh *conflicting evidence*, but will treat the evidence as withdrawn which is most favorable to the demurrer." To the same effect are all the other decisions heretofore cited in this feature of the case.

It appears to me that practically everything in this case is eliminated by what we have said on the

legal aspect of the case and the findings of the trial court, except the marriage between Ben Porter and Jennie McGilbra. The court, as we have said, has already found that Nellie Porter was the child of Ben Porter and Jennie McGilbra; but she is stamped with the stigma of illegitimacy, and therefore a bastard in the eyes of the world, and not entitled to the lands of her father. We say frankly that we do not believe that either the law or the evidence justifies this finding or the decision of the trial court. Ever bearing in mind that this is a demurrer to the evidence and a decision on that demurrer, let me call the attention to the few simple facts that sustain the allegation of said marriage. The mother herself testified that they were married. Who contradicted it? No one. She says that Ben asked her to marry him up at the Council at Okmulgee, and she immediately consented, and they went that day to his mother's home, slept together that night, and lived there for about a year and a half, during which time she became pregnant, and three months after they separated, she gave birth to Nellie, the plaintiff in this suit. Who denies her statement? Not one. But on the contrary she is corroborated in this by the testimony of Roley Alexander, who says she and Ben used to come to his father's home frequently together, that Ben told him that this child was his, and that they so lived there at Ben's father's about a year; and she is also corroborated by the testimony of William Sullivan, who says she

lived there about two years; that Ben told him he had a child, and the child was born at Jennie's mother's down at Eufaula. Also Mary Grayson and Bettie McIntosh say the grandmother, Mary Porter, told them that that was Ben and Jennie's child, and that the child was at the grandmother's. Robert Thomas says that Ben told him that was his child and that he was married to Jennie. Roley Alexander says Ben told him that Jennie was his wife. John Lowe says Mary told him the child was Ben's. Mary Grayson and others say that they were reputed in the community to be man and wife. Who denies these facts? Not one. The trial court in delivering its opinion commented upon the statement of Roley Alexander that a workhand at Ben's father's said Jennie was there "to cook;" but Roley emphasized that fact in connection with that remark that Ben told him that Jennie was his wife; also upon the remark of John Goat, that where they just went together and done well it was all right, etc., and that John Lowe said he did not think they were married. But it developed that Lowe was in Texas along about this time, and knew nothing of the matters of his own knowledge. But here, instead of the court forgetting all such remarks and refusing to consider them, as was his duty under the above cited decisions, on a demurrer to evidence, he seized upon the very things the law thus says he must not see or think of, and on them alone decided this case adversely to the plaintiff in error.

Of course, his remarks did not go into the record like the evidence; but these were the comments of the trial judge as the reasons for his opinion. But had he not given his reasons openly, this would necessarily have been the only ground on which his opinion could rest. Because, under these decisions, on a demurrer to evidence, the court is obliged to pass over "conflicting evidence," and give credit for "all the inferences and conclusions which may reasonably and logically be drawn from the evidence." Nay, he "may not *disbelieve" or "disregard"* the evidence adduced by the plaintiff on the demurrer thereto of the defendant. But in the case at bar, the learned trial judge failed to forget these things, but weighed the conflicting evidence and gave all "inferences and conclusions" *against* the plaintiff in error—not in her favor, as the law required him to do. The defendants in error had their day in court and their opportunity to prove their cause and to disprove that of the plaintiff in error, but they saw proper to rest their whole case on a demurrer to the evidence of the plaintiff in error. Where such things are done, the law says that every inference, even the "slightest degree of evidence," and all inferences and conclusions of both law and fact, are resolved in favor of the plaintiff and against the defendant who thus demurred. And all conflicting evidence must be regarded as withdrawn by the party demurring, and disconsidered by the court. Now, applying these rules, thus laid

down by the Supreme Courts of Oklahoma, Kansas and old Oklahoma Territory, and every other court, where will it place the plaintiff in error? The testimony of Jennie Washington herself was all the plaintiff in error needed in this case, had she known the case was going to turn on a demurrer to the evidence. She said they were married, lived together as man and wife for one year and a half, and that Ben Porter was the father and the child was begotten in wedlock and born about three months after their separation. That was all there was necessary to prove until this much was disproven by the defendants.

Surely, the fact that the plaintiff in error went on thereafter and proved by other witnesses that Ben himself told different persons that Jennie was his wife, that he had married her, that Nellie was his child and Jennie was its mother, and that he had as good a right to get married as anybody, etc., would not *weaken* the case any. It is a legal impossibility to weaken that case, no matter even if there was conflicting evidence in the record; for on a demurrer the court cannot consider conflicting evidence; nor can it *disbelieve or disregard* the evidence in favor of the plaintiff. Then where is there any legal ground on which this decree can stand? If there is any in this case, I confess my total lack of ability to see where it is, or may be found anywhere in the record in this case. On a demurrer to the evidence, you cannot go into the evidence and

shift around for some inconsistency, conflict of evidence or some vague notion hinged on some insignificant feature on which to hang a judgment or decree; but on the contrary must overlook such things altogether and fail to see them. If there is any competent evidence even "*in the slightest degree*" sustaining the plaintiff's cause, the demurrer *must* be *overruled,* and a judgment given in favor of the plaintiff. Under the law, the trial court has no option about what it must do in such cases. The law is simply imperative, and must be obeyed under such circumstances. Under the evidence in this case, where is the evidence or law on which this decision can rest? I confess frankly I have not the ability to see it, and as candidly do not believe it will ever be pointed out.

A discussion on disparaging or conflicting evidence, or some off-hand opinion like that of Lowe, that he did not believe they were married, etc., would not be competent or any legal argument whatever, because such things are forbidden to be seen or heard by the court on a demurrer to evidence. And, of course, such an argument on that line would not be either proper or legitimate discussion, because if the court cannot consider the same, it would be an imposition upon the court to undertake to present such illegal matters to the court, right in the face of the law that forbids it, and forbids the court to consider it. The trial court had no trouble in finding that there was a custom and common

usage among the Creeks as to marriages among such citizens, and said so in the record long before plaintiff in error had finished the testimony on that branch of the case, and which is set out in the above copied parts of the record. The testimony shows that all that was required under those customs and usages to consummate a valid marriage among such citizens, was simply for a man and woman to agree to be husband and wife, and go to living together, and their offspring was deemed legitimate (see the testimony of John A. Jacobs, Robert Thomas, John Goat, Barney Tiger and Johnson E. Tiger on this subject). Who denied or contradicted their testimony? Not one. Is not this the very thing Jennie says took place between her and Ben? Then her case came squarely within the provisions of law of the Creeks, and her marriage was valid, as 75 per cent or 80 per cent of the other marriages of such citizens, shown by the testimony of Johnson E. Tiger to have been consummated in this way. Then, Nellie was a legitimate child of Ben Porter and Jennie, and is today the sole and only heir at law of Ben Porter, deceased, and entitled to the lands in controversy. As it has been held in *Ziska* v. *Ziska*, above cited, "the demurrer admits all the facts which the evidence in the slightest degree tends to prove," and "all the inferences and conclusions which may be reasonably and logically drawn from the evidence," let me call the court's attention to the decision in the case of *Locust* v. *Caruthers et al.*,

100 Pac. 520, which was likewise an Indian case in the Choctaw and Chickasaw Nation, respecting the legitimacy of children. In that case the court held:

> 4. "In controversies involving heirship and the legitimacy of children, the presumption of law is in favor of legitimacy, and the reason back of this presumption is that the law encourages decency and morality and right living.
>
> 5. After a long lapse of time, where proof is given that certain persons are the children of a certain man and woman and were recognized and treated by the parents and other members of the family, legitimacy will be presumed, even though there was no direct evidence of the marriage of the father and the mother."

In the opinion of the court in that case, the court observes: "In controversies involving heir ship and the legitimacy of children, the presumption of the law, is in favor of legitimacy, and the reason back of this presumption is that the law encourages decency and morality and right living." In 8 Enc. of Ev. 165, the rule is stated thus: "In controversies involving the question of legitimacy, direct evidence of marriage is not necessary. It may be inferred from circumstances, and ordinarily when not inconsistent with other facts in evidence, proof of cohabitation and reputation is sufficient. * * * After a long lapse of time, the parties being dead, the legitimacy of a child shown to have been born of a certain man and woman is presumed, although there is no evidence of marriage."

It would seem that in that case there was no evidence whatever that the father and mother had ever been married, but the evidence showed these were their children. Still, the court held on a full hearing on the merits of that case that such children would be presumed to be legitimate—that such may be inferred from the circumstances. In *Ziska* v. *Ziska*, the court held that "all inferences and conclusions" arising out of the evidence should be resolved against the party demurring. Hence, it is that, even had there been no evidence in this case of the marriage, the "inference," "conclusion" and "presumption" would have been that Ben and Jennie were married, and Nellie would have been presumed legitimate, under this decision. But the mother of Nellie Porter testified that she was married to Ben Porter and lived and cohabited with him for one and a half years, and of that marriage and cohabitation this child was born. Not only that, but, as I have pointed out, Ben and his mother, Mary, told different ones that Nellie was Ben's child. It was taken into the home of the grandmother, Mary, the mother of Ben, and recognized as his child. William Sullivan testifies that they lived together nearly two years; that Nellie was born about three months after their separation at Jennie's mother's down at Eufaula, that he had known Jennie ever since she was a little child, and also knew the Porters and associated with them and stayed with them when he would go up to Okmulgee. That has been

from fifteen to eighteen years ago since this marriage took place, and all these long years no one ever disputed or denied it until life became extinct with Ben Porter and then, and then only, STRANGERS come in to stigmatize his name and bastardize his only child, which in his lifetime he claimed as his own, and always recognized as his own offspring arising from his marriage with Jennie. We might ask with a good deal of propriety and pertinence, why did the defendants in error rest their case without a line or syllable of evidence in this case? The evidence in the case must, under these decisions and the law, be taken, held and construed against them and in favor of the plaintiff in error, and all the facts alleged in the petitions must be held established even on the "slightest degree" of proof tending to establish those facts. Why did they risk their case on so tender a cord, if they were full-handed in proof of the illegitimacy of Nellie Porter and the illicit relation between Ben and Jennie during this time? There was Sam Porter, a brother, and Nannie Broadnax, a sister, by whom, it is supposed, these things could have been proven if they were living in adultery. They were not called; nor did they dare put a witness on the stand to testify to these things. Can it be presumed that Ben Porter's mother would have permitted her son to have lived in adultery for one and a half or two years right in her own home—right there among her own children? Can we presume the immorality

of such conduct not only on the part of Ben and Jennie, but likewise of this mother in permitting that cohabitation under her own roof? The court held in the case of *Locust* v. *Caruthers* that legitimacy is presumed even where there is no evidence of marriage of the father and mother after a long lapse of time. I feel that we could stop here and rest this case on the decisions already cited, and no defense could be made against the position we have taken. But owing to the fact that this is a matter of great importance, not only because of the amount and value of the property, but likewise because of the subject matters involved and the unusual conditions arising out of it, the marriage and result of this custom prevailing then among these Indians, and the further fact that this decree fixes a stigma upon the life of this little Indian child and her parents, by holding that she is the illegitimate child of Ben and Jennie Porter, and for that reason not entitled to the lands of her deceased father, I have made up my mind to spare no pains, time or labor in presenting this case as fully as possible. I have searched the State Library for this information, and wherever a case was found which I supposed would throw any light on the subject of Indian marriages, their usages and customs respecting the same, I have had the same copied in full from the reports found there, and for the convenience of the court I herewith insert them *in haec verba,* along with such other decisions and authorities as I find, in

connection with the various Acts of Congress on this subject. For the time being, therefore, we will leave the immediate consideration of the case to deal with the subject in the abstract. We will take first the decisions of various Supreme and State Courts of different States of this Union, then the general laws on the subject, and then such other decisions and laws as may pertain to the subject matter of inquiry.

The case of *National Bank of Austin* v. *Sharpe*, 12 Tex. Civ. App. 223, 33 S. W. 676, was a Creek controversy about a marriage between W. T. Patterson and Alcy, an Indian woman, who took up with each other and lived and cohabited together without any ceremony of marriage, and had one child. Alcy lived in the Creek Nation, in the Indian Territory. Patterson died in June, 1891, and left $2,000.00 in the bank. This child brought suit against the bank for that money of its father, just as Nellie Porter has brought suit for the lands of her father, and the Texas court held in her favor. The case was appealed. The Circuit Court of Appeals, in delivering the opinion in the case, held:

Case of *National Bank of Austin* v. *Sharpe*, 12 Tex. Civ. App. 223, 33 S. W. 676.

SYLLABUS.

1. In an action where the issue was whether plaintiff's father and mother were married at the time of her birth, it appeared the

the mother was an Indian, residing within the Creek Nation, in the Indian Territory; and the parents without having any ceremony performed, agreed to become husband and wife; that they cohabited for a considerable time before and after plaintiff was born, and publicly treated each other as husband and wife; that, according to the customs and usages of the Creeks, the facts recited constituted a valid marriage. *Held* that the parents were married.

2. The court may permit amendment of pleadings after the evidence is all in and the opening argument has been made.

3. The probate of a will is a proceeding *in rem* as to all of the property devised, but as to property not devised heirship cannot be established in such proceeding.

KEY, J.:

Appellee claims to be the legitimate child and sole heir of W. T. Patterson, deceased, and sues to recover money belonging to said Patterson, and held on deposit by appellant at the time of his death. Appellant admitted in its answer that at the time of Patterson's death, in June, 1891, he had on deposit with appellant the sum of $2,000, and judgment was rendered against appellant for that amount, with 6 per cent interest from March 9, 1894, the time the suit was commenced.

It was proven, and is not disputed, that appellee is a daughter and only child of W. T. Patterson; that her mother was an Indian woman named Alcy; and the only question of fact in the case is whether or not she and Patterson were married at the time appellee was born, which was about the year 1848. At that time,

and prior thereto, Mrs. Alcy, as she was called, was the surviving widow of a man named Atkins, who, it appears, went to California, and died. Mrs. Alcy remained in the Creek nation, in the Indian Territory, and, though there is no positive proof of such an agreement, there is evidence tending to support the conclusion that W. T. Patterson and Mrs. Alcy, without having any marriage ceremony performed, agreed to become husband and wife, and the evidence is quite clear that they lived and cohabited with each other for a considerable time before and after appellee was born, and publicly recognized and treated each other as husband and wife; that during that time, if Patterson did not entirely support Alcy and her child, he contributed largely to that end; and for years afterwards he acknowledged appellee to be his child, and contributed to her support. It was also shown that at the time in question the Creek Indians had no written laws concerning marriage, and that, according to their customs and usages, the facts above recited would show a valid marriage. Such being the case, although there are some circumstances in evidence tending to show that it was not Patterson's intention to, and that he did not believe that he had, legally married the woman, Alcy, we cannot say that the court's finding on this issue is not correct.

After the evidence had been introduced, and while the defendant's counsel was replying to the opening argument of the plaintiff's counsel, and contending that the plaintiff could not recover, because she had not pleaded any customs and laws of the Creek Nation concerning marriage, the trial court allowed the plaintiff,

over the defendant's objection, to amend her petition in that respect; and that ruling is assigned as error. Notwithstanding the verbiage of the statute, and some decisions tending to support the objection that it was too late to amend, under the latest case by our supreme court that has come to our knowledge, as well as some former decisions, it was within the discretion of the court to allow the amendment; and the record does not disclose any abuse of discretion. *Telegraph Co.* v. *Bowen*, 84 Tex. 477, 19 S. W. 554. The fifth section of appellant's answer reads thus: "Further specially answering herein, the defendant says that at the time of the death of W. T. Patterson, on the —— day of June, 1891, he had on deposit with defendant the sum of two thousand dollars, and no more; that it refused to pay the same to any one until it had been established who were the heirs of said Patterson; and in two suits in the district court of Travis county, Texas, it was determined who the heirs of said W. T. Patterson were, to-wit, in Cause No. 10393, *G. M. Patterson* v. *Francis Patterson*, and in Cause No. 11978, *Estate of Wm. T. Patterson*, probating the will of said Patterson; that after it was established in said causes who were the heirs of Wm. T. Patterson, it paid out said money to the parties so shown to be the heirs of said Patterson, and who are indeed his heirs." Then follows a statement of the sums paid out, and when paid out to each of the parties so found to be his heirs, giving names of each. The district court sustained an exception to so much of this plea as stated to whom and why appellant had paid the $2,000 held by it for Patterson at the time of his death;

and this ruling is assailed by appellant. We do not understand counsel for appellant to contend that, because it was proved and decided in the suit between G. M. Patterson and Francis Patterson that certain persons were the only heirs of W. T. Patterson, therefore appellee, though not a party to that suit, is estopped from showing the contrary; but the proposition relied on is stated thus in appellant's brief: "The probating of said will of W. T. Patterson was a proceeding *in rem*, and the finding of the court in said proceeding of who the heirs of W. T. Patterson were is binding and conclusive against all the world." We are not prepared to agree to this proposition in its entirety. It may be conceded that a proceeding to probate a will is a proceeding *in rem* as to all the property disposed of by the will, but it is not such a proceeding as to property not disposed of by the will, and therefore not involved in the probate proceeding. If the plea had been shown that the will of W. T. Patterson had been probated, and that it devised the property here involved to some person other than appellee, it would have presented a sustainable defense. As to property not devised, heirship cannot be established in a proceeding to probate a will. But it is not claimed that the will, or the probate proceedings, had any reference to the subject-matter of this suit, and therefore we think the plea was properly stricken out. No reversible error has been pointed out, and therefore the judgment will be affirmed.

Affirmed.

The case of *Jones* v. *Laney et al.*, 2 Tex. 342, arose over the manumission of some slave who formerly belonged to a citizen of the Chickasaw Nation of Indians, and involved the laws, usages and customs of that Nation. This is of kindred nature and is inserted here because of the fact that even at that time and respecting the emancipation of slaves by the Indians, their usages and customs and political existence was recognized and followed. The court said:

Syllabus to case of *Jones* v. *Laney et al.*, 2 Tex. 342.

SYLLABUS:

1. The right of those Indian Nations, residing within the limits of a state to regulate their own civil policy has never been questioned, unless the state authority has, by some affirmative act, claimed a jurisdiction incompatible with such right. Their laws and customs regulating property, contracts and the relations between husband and wife, have been respected when drawn into controversy in the courts of the state and of the United States.

2. The statutes of a state cannot be judicially known to the court of another state, and they must be proven as other foreign laws. The courts can only judicially know the Acts of Congress and public treaties.

3. Where the plaintiffs, who were negroes, sued to establish the fact of their freedom, and gave in evidence thereof a deed of manumission in their favor, executed by their

master whilst a citizen of the Chickasaw Nation of Indians, and who, together with such negroes, then resided therein; and the judge charged the jury, "That in the absence of proof of any law, custom or usage of the Chickasaws forbidding the emancipation of a slave, if the deed presented was fully proven and they believed it to be good, genuine and authentic, the plaintiffs were entitled to their freedom." *Held,* that such charge was correct.

4. Where the relation of master and slave is proven to have existed and the latter was freed by the former, the presumption is that such act was rightfully done, on the general principle that the right of property connects with it the right of relinquishing that property. This presumption can only be rebutted by proof of some municipal regulation applicable in restraint of such right, the *onus* of proving which must devolve on the party denying the right. (17 Tex. 20.)

5. Where a witness swore to a fact as happening in 1821 or 1822, and other testimony was introduced showing that the fact did not happen until after 1823, it was not error in the court to charge the jury that it did not destroy the credibility of the witness as to other facts —the witness being only presumed to swear as to the time according to his best recollection and belief.

Judgment of lower court was affirmed.

The case of *Earl et al.* v. *Godley et al.*, 42 Minn. ...., 44 N. W. 254, also arose over the legitimacy of a child of Henry Ortley and Jane Ortley,

who were Sioux Indians and had taken up with each other and lived together as man and wife, and had a son also named Henry F. Ortley, Jr. This son died and left an estate in lands and this controversy arose over the heirship to that land and involved the marriage of his father and mother, the same as in the case at bar, except in that case it was the lands of the son, whereas here it is the lands of the father. But the principle is the same. In that case the Supreme Court of Minnesota observed:

Case of *Earl et al.* v. *Godley et al.*, 42 Minn. ——, 44 N. W. 254.

SYLLABUS.

An Indian tribe within the state, recognized as such by the United States government, is to be considered as a separate community or people, capable of managing its own affairs, including the domestic relations, and those persons belonging to the tribe who are recognized by the custom and laws of the tribes as married persons must be so treated by the courts, and the children of such marriages cannot be regard as illegitimate.

VANDERBURGH, J.:

The only question presented by the record is whether Henry F. Ortley, under whom defendants claim title, and Jane Ortley, were husband and wife, so that the former, under the laws of inheritance and descent in this state, became entitled to the land in controversy as the heir at law of Henry F. Ortley,

Jr., deceased, who was the patentee of the land, and is admitted to have been the child of the parties first named. It is denied by the respondents that Jane was the lawful wife of the first-named Henry Ortley. The case was tried before a referee, who found for the defendants on the issue presented, and among other facts that the child, Henry F. Ortley, Jr., was born in 1849, in what is now the town of Bloomington, Hennepin county, in this state, and that he died in the same place about the year 1859, and was a half-breed or mixed blood of the Sioux nation of Indians; that at the time of his birth his parents had been living and cohabiting together as husband and wife, and continued so to do, from about the year 1848, for the period of 16 years, during which time several children were born unto them, including Henry, and during all of this time they continued to reside in Bloomington with and among the tribe of Sioux Indians, and that they were married about the year 1848, in accordance with the usage and custom of the tribe with which they lived. And in respect to this Indian custom it is found that among the Indian tribe there was a custom or law that any member of the tribe who desired to obtain a wife might purchase one, and the man and woman would thereupon, in accordance with such custom, live and cohabit together as husband and wife without other or further marriage ceremony; and that, in accordance with the usage and established custom prevailing among them, the parties might either of them also divorce themselves by dismissing or abandoning the other, without further ceremony, and thereupon either

were at liberty to take another husband or wife, and that among the tribe referred to there was no other custom, law, or form of marriage. These parties must be deemed to be, as the referee found they were, husband and wife, under the custom and law of their tribe, and the sole remaining question is whether such Indian marriages should be treated as valid, and the children of such marriages legitimate. The distinct tribal relations of these Indians were during the time in question still maintained, and they were recognized by the United States as a distinct political community. *U. S.* v. *Shanks,* 15 Minn. 369, (Gil. 302). And where the tribal relation is still recognized by the government as existing, in its dealings with them, the fact that their primitive habits have been modified by their intercourse with the whites does not authorize a state to treat them as subject to its laws in respect to their relations and dealings with each other. *Kansas Indians,* 5 Wall. 737. The general rule is that marriages valid by the laws of the country where they are entered into are binding here, though not solemnized in accordance with the provisions of our laws; and the same rule must be adopted in relation to these Indian marriages, where the tribal relation still exists. Under the laws of the United States they are recognized as capable of managing their own affairs, including their domestic relations, and those persons who were recognized by the Indian custom and law as married persons must be so treated by the courts, and their children cannot be regarded illegitimate. *Kobogum* v. *Iron Co.* 43 N. W. Rep. 605, and cases cited; *Boyer* v.

Dively, 58 Mo. 510; *Sutton* v. *Warren,* 10 Metc. 452. The estate of Henry F. Ortley, Jr., therefore was inherited by his father, and the defendants are the lawful owners of the land in controversy. Order granting new trial reversed, and case remanded, with directions to render judgment for the defendants upon the report of the referee.

The case of *Fisher* v. *Allen,* 2 Howard, 611, (Miss.) was a case that arose over the levy of an execution upon a slave which was claimed by Susan Allen under a deed from her mother, Betsy Love, who had married John Allen according to the usages and customs of the Chickasaws. John Allen became indebted to Fisher who sought to subject this slave to the payment of his claim. In the legal proceedings, an uncle of Susan interposed for her, and the court decided on her behalf. Whereupon the case was taken to the Supreme Court of Mississippi, and that court held:

Case of *Fisher* v. *Allen,*
2 Howard, 611. (Miss.)

SYLLABUS.

1. By the act of the legislature of 1830, abolishing the tribal customs of the Chickasaw Indians, and extending the laws of this state over their territory, it is enacted, that all marriages and matrimonial connections entered into by virtue of any custom or usage of the Indians, and by them deemed valid, shall

be held as valid and obligatory as if the same had been so solemnized by the laws of this state.

2. By the customs of the Chickasaws, the husband acquired no right to the property of the wife, which she possessed at the time of marriage.

3. No community of interest was produced by the marriage contract, with respect either to the original property of the parties, or to the acquests and gains during its continuance.

4. Property belonging to the wife under the Indian customs, is not liable to the debts of the husband.

Mr. Justice Smith delivered the following opinion:

An execution was issued from the circuit court of Monroe county, and levied on a slave as the property of John Allen, who was the defendant in said execution. George Allen, the brother and next friend of Susan Allen, a minor, claimed the said slave for her, and gave bond in conformity with the requisitions of the statute, for the trial of the right of property; and the issue joined upon this proceeding having been decided in favor of the claimants, John Fisher, the plaintiff in execution, has removed the case by writ of error, into this court. The facts of the case appear to be, that the claimant of property asserted title to it under a donation by deed, executed on the 14th day of November, 1829; and also by virtue of a parol gift made long anterior to that period, by Betsy Love, who was mother of the donor, and wife of the defendant in

execution. Allen and Betsy Love were inhabitants of the Chickasaw territory; and the relation of husband and wife, existing between them, arose under the tribal customs of the Chickasaws.

In the year 1829, the limits of jurisdiction of Monroe county was extended over that portion of the Chickasaw territory in which Allen and wife resided, and the property which is here the subject of contest remained in the possession of the latter down to the time of the levy.

In August, 1830, John Allen became indebted to Fisher, and the deed of gift before averted to was recorded in the county of Monroe, on the 2nd of November of the same year.

Two questions are brought to the consideration of the court:

1. Whether, under the laws of this state, Allen, by his marriage with Betsy Love, acquired such an interest in her property, as to subject it to the claims of his creditors.

2. Whether the gift to Susan Allen was void, as to persons having claims against Allen.

By the customs of the Chickasaws, the husband acquired no right to the property of the wife which she possessed at the time of marriage. It remained to her separate use and subject alone to her disposition and constraint. She was, so far as it regards the obligation of contracts, the acquisition and rights of property, perfectly independent of the husband. No community of interest was produced by the marriage contract, with respect either to the original property of the parties, or to the acquests and gains during its con-

tinuance, and to the wife was confided exclusively, the custody and the nurture of her children.

The slave Toney, who had been levied upon to satisfy Fisher's demand against Allen, was proved to be the separate property of Betsy Love, at the time of the donation; and from what has been stated of the rights which arise to the husband under the laws and customs of the Chickasaws, it is obvious that no title to this slave vested in Allen, which could subject him to the claims of Allen's creditors. But it is contended that the jurisdiction of the state attached to every individual within its limits, and that consequently, the marriage contract, whether between Indians or the white inhabitants, would be controlled by its laws. And that the jurisdiction commenced in 1799, immediately upon the organization of the territorial government.

It does not appear that the marriage between Allen and Betsy Love took place under the territorial government; it is therefore unnecessary to inquire whether congress was vested with the power to subject the individuals composing the Chickasaw nation, within the limits of their territory, to the legislature of the territory of Mississippi, or whether such a right in fact was attempted to be exercised.

But upon the admission of Mississippi into the Union she became clothed with the attributes, and was vested with the power of sovereignth, and could exercise every right which attaches to that character, except where she was restrained by the compact of union. As a necessary consequence of this position she had a right to enforce the obedience of every in-

habitant of her territory. This right, however, was never enforced with the individuals composing the different tribes of Indians within her limits, until 1830, when the legislature abolished the tribal character of the Choctaws and Chickasaws, conferred upon them as far as was permitted by the constitution of the state, the rights of citizenship, and subjected them fully in person and property to the operation of our laws. By the 4th section of this act it is provided "That all marriages and matrimonial connections entered into by virtue of any custom or usage of the said Indians, and by them deemed valid, should be held as valid and obligatory as if the same had been solemnized according to the laws of the state." Acts of January session, 1830, page 6.

The marriage of Allen and Betsy Love is therefore valid, and the rights of the parties under it must be enforced.

The act necessarily refers to the state of the marriages or matrimonial association then existing among the Indians, and they must be considered as equally valid at their commencement as at the passage of the law. The law of the place where contracts are entered into forms part of their essence. The terms of the marriage contract between Allen and Betsy Love, as modified by the customs of the Chickasaws, conferring no right on him to the separate property of his wife, and no just construction can be given to the act validating their marriage, which would alter their condition or extend the marital rights of the husband.

In fact, such a construction would bring the case in conflict with the constitution; for if Allen, by marriage, acquired no interest in

the property of his wife, the property was hers at the passage of the law; and to give it such an interpretation as would confer upon him the ownership, would work a divesture of her rights. It was the intention of the legislature to extend to these persons the full protection of the law; they were made members of the civil community. It was not the intention of the legislature, nor could they, if they had so intended, violate the sanctity of private property.

The property of Betsy Love, was, therefore, not subject to the demands of Allen's creditors.

From this view of the subject we are bound to affirm the judgment of the circuit court, and it becomes, therefore, unnecessary to investigate the second point raised on the argument of this court.

Mr. Chief Justice Sharkey delivered the opinion of the court.

An execution from the circuit court of Monroe county, against the goods and chattels of James Allen in favor of the plaintiff, was levied by the sheriff on a negro boy, who was claimed by Susan A. Allen according to the provision of the statute. On the trial of the issue directed by the circuit court, a verdict was found for the claimant. The evidence given on the trial is contained in a bill of exceptions, and the cause comes to this court by writ of error. The evidence shows that the claimant, and her mother, and the family are Indians of the Chickasaw tribe, resident in the country belonging to or occupied by that tribe.

That the property in question was claimed by virtue of a deed of gift executed by the mother of the claimant, by which she gave separate property to ten of her children, giving to the claimant the property claimed. The deed was executed in November, 1829. That although Betsy Love, alias Betsy Allen, was, according to the Indian customs, the wife of James Allen, the defendant in execution, yet according to their laws, she had a right to own separate property, to dispose of it at pleasure, to create debts and in most things act as a *feme sole*.

It also appeared that the property disposed of by the deed of gift was the separate property of the wife, having belonged to her, before marriage. The possession of the property claimed, remained with the mother until the time of the creation of the debt sought to be collected, which was in August, 1830. That the claimant was an infant. The counsel for the plaintiff requested the court to charge the jury, that as the deed by which the property was claimed was not recorded within three months after the extension of our laws over the Indians, it was valid against the creditors of James Allen, and the court refused it.

The first point deemed necessary to consider is on the charge requested of the court on the law requiring certain instruments to be recorded. The laws of this state were extended over the Indians in January, 1830, and the deed of gift was executed on the 14th of November, 1829. There does not seem to be any defect in the gift in its inception; the individual who made it, by the tribal customs, had an undoubted right to the property bestowed, and an equal right to make the gift, and did ac-

tually make it to her daughter. We cannot well conceive how a law not in force until after the gift was complete, could affect the rights of parties vested by the deed. The statute of 1830, although it repeals and abolishes the tribal laws and customs, cannot be construed to extend so far as to interfere with the rights to property previously acquired.

Indeed the statute seems rather to recognize and confirm the Indians in the enjoyment of whatever rights of this kind that had accrued by their customs. If the laws of this state were always in force over that part of the state occupied by the Indians, which is a position contended for by some, yet it might be a matter of great doubt whether the marriage between James Allen and Betsy Allen could be considered as a valid one; and even if it were so, it might be questionable, whether it would necessarily carry with it in full force, all the conditions, consequences and incidents under which, it was entered into, one of which seems to be by marriage, the property of the wife does not vest in the husband, but remains subject to her own disposal. If so the gift would still be good and effectual.

It is urged that the property given remaining in possession of the mother, was evidence of fraud. There does not seem to have been any claims existing against Betsy Allen at the time of making the gift nor at any time afterwards, and it is shown that the creditors of James Allen could have no claim on it, even if these debts had existed at the time of making the gift; but it does not appear that any such debts existed at the time.

There does not, therefore, seem to have

been any motive for committing a fraud, and to decide that the possession amounted to fraud and vitiated the gift, would be to decide that a given state of facts would amount to fraud, without such intention in the parties, and under a state of things when no one could be prejudiced, and no one take advantage of it.

The appearance of the defendant by attorney, being an infant, is assigned as error. If this were error, it is amply provided for in the *Revised Code,* p. 124, sec. 91. It cannot now be noticed, unless the objection had been properly taken below. The informality in entering the verdict of the jury, is not deemed sufficient cause of error. Indeed it was partially abandoned in the argument.

The judgment of the court below must be affirmed.

The case of *Morgan* v. *McGhee,* 5 Humn. 13, (Tenn.) was another case which arose over a slave and involved the marriage of Margaret Morgan and Gideon Morgan, who were married according to the usages and customs of the Cherokee Nation, and had five or six children. He was a white man and she was a half-blood Cherokee Indian. In passing on that case, the Supreme Court of Tennessee held:

Case of *Morgan v. McGhee,*
5 Humph. (Tenn.) 13.

SYLLABUS.

All marriages of a foreign country, consummated in pursuance of the forms and

usages of such country, are recognized as valid by the laws of Tennessee; and therefore a marriage consummated according to the usages of the Cherokee Tribe of Indians within that portion of Cherokee country which is within the limits of Tennessee, yet before the extension of the laws of Tennessee over it, was held valid.

STATEMENT OF FACTS.

Margaret Morgan instituted this action of *detinue,* for slaves, in the Circuit Court of Monroe county, against John McGhee. McGhee pleaded that plaintiff was the wife of Gideon Morgan, and being a *feme covert,* had no right to sue. Issue was taken on this plea, and the case was tried by Judge R. M. Anderson, and a jury of Monroe county, at the September term, 1844.

It appeared that McGhee had purchased the slaves at execution sale against Gideon Morgan; that Gideon Morgan and Margaret Morgan, alias Sevier, were married according to the usages of the Cherokee tribe of Indians in that part of the territory of the Cherokees which was within the limits of the State of Tennessee, in 1813; that all that was necessary by their usages was a public agreement to live together as man and wife; that they afterwards lived together as man and wife; and in 1818, they were married according to the ceremonies of the laws of Tennessee in the Cherokee country and before the laws of Tennessee in the Cherokee country had been extended over it; that Margaret Morgan and Gideon Morgan removed to Monroe county, and had some five or six children, who went by the

name of Morgan; that he was a white man and she was a half-blood Cherokee, and that he prosecuted her claim to a portion of land in the Cherokee territory, reserved by treaty; that the slaves in controversy were delivered to Margaret Morgan in 1828 by her mother, &c.

The judge charged the jury, that if Margaret Morgan, alias Sevier, was married to Gideon Morgan within the limits of the Cherokee territory according to the usages of that tribe, the laws of Tennessee would recognize the marriage as valid.

The jury returned a verdict in favor of the defendant, and judgment was rendered thereupon, from which the plaintiff appealed.

TURLEY, J.:

The defendant pleads in abatement, that the plaintiff is a *feme covert,* upon which plea there is issue. The proof shows, that the plaintiff, Margaret Morgan and one Gideon Morgan were married in the Cherokee Nation of Indians according to the forms and ceremonies of the tribe sometime in the year 1813; that Margaret was a Cherokee woman residing in the Nation; that she and Morgan lived together many years as man and wife, and had a large family of children; that they are now living apart, and that he is alive. Upon this proof the jury found that the plaintiff was a *feme covert.*

We think the testimony supports the verdict. Our courts of justice recognize as valid all marriages of a foreign country if made in pursuance of the forms and usages of that country; and there is no reason why a marriage made and consummated in an Indian Na-

tion should be subject to a different rule of action. The fact, that a portion of the lands inhabited by the Cherokee Indians was within the limits of the State of Tennessee, and that the marriage took place within that portion, cannot effect the question. The nation of Cherokees was at the time independent of the State of Tennessee; her laws and usages had not been extended over it, and were not obligatory or binding upon it.

To hold this marriage to be void would be to vitiate all the marriages made in the Nation, and might be productive of much mischief.

The Circuit Judge committed no error in refusing a new trial.

Judgment affirmed.

NOTE:—As to what constitutes a valid marriage by the laws of Tennessee, see *Bashaw* v. *State*, 1 Yerg. 177; *Grisham & Ligan* v. *State*, 2 Yerg. 539; *Sellars* v. *Davis*, 4 Yerg, 503.

As to foreign marriages the general principle is, that the *lex loci* is the governing rule in deciding upon their validity, or invalidity, as in all other personal contracts. The *lex loci* is to be considered in expounding or enforcing a contract, not from a blind deference or comity towards a foreign law, but because it is presumed that the parties had in view the laws of the country in which the contract was entered into, and that they meant to be governed by it. It is of the essence of the subject matter to ascertain the meaning of the parties. Therefore, the courts of the country where the question arises resort to the law of the country where the contract was made, not *ex comitate* but *ex debito justitiae*. A marriage good by

the laws of the country where consummated, is held good in all others where the question of its validity may arise. Shelford on Marriage and Divorce, 114; *Warrender* v. *Warrender,* 2 Clark & F., 9 Bligh. 110; Story on Confl. L. 36; 2 Kent, 457; 2 East, 453; 1 Bland, 435. A marriage celebrated abroad, and being void where celebrated, is invalid in England. Shelf. 123; 2 Hagg, 419.

The contract of marriage is a stable and sacred contract of natural as well as municipal law. 4 John. Ch. 501, 503.

We next present the case of *Ortley* v. *Ross et al.,* 110 N. W. 982, which also involved a marriage among Sioux Indians according to their usages and customs. In that case the Supreme Court of Nebraska held:

Case of *Ortley* v. *Ross et al.,*
110 N. W. 982.

SYLLABUS.

Marriages valid under the customs of an Indian tribe, which were performed among members thereof while the tribal relation existed, will be considered valid in the courts of this state, and children of such marriages will be regarded as legitimate.

OLDHAM, C.:

This was an action instituted by the plaintiff in the district court of Knox county, Nebraska, for the purpose of quieting her title to an undivided one-half interest in a tract of land situated in that county, and for a parti-

tion of the land among the heirs of Daniel Paypay, deceased. Daniel Paypay was a Santee Sioux Indian, who had taken the land in controversy as an allotment, under the provisions of the treaty entered into with the Santee Sioux tribe by the United States on February 24, 1869, by which the United States agreed to give a patent to any male Indian of that tribe for 160 acres of land under the conditions named in the treaty. By the provisions of this treaty any Indian receiving a patent under it became a citizen of the United States. After the receipt of the patent, he appears to have remained on his allotted lands in Knox county, and died there intestate in 1889. The main question at issue in this suit was as to who were his legal surviving heirs at the time of his death. The petition alleged that plaintiff and Sarah Ross, mother of the defendants, were the sole surviving legal heirs at the death of the ancestor, and that Sarah Ross had departed this life intestate on the 14th day of May, 1903, leaving the defendants named in the petition as her heirs at law. The answer denied the heirship of the plaintiff and alleged that the defendants, heirs of Sarah Ross, were entitled to the entire estate. There was a judgment for the plaintiff in the court below, and to reverse this judgment defendants have appealed to this court.

It is urged against the decree by appellants that there was a misjoinder of causes of action in plaintiff's petition, in that no partition of lands could be awarded until the title of the plaintiff herein has been established, and, as the title was in dispute, partition would not lie. This is an objection first interposed in

this court, and which, as far as the record shows, was not called to the attention of the trial court. No motion was filed or demurrer interposed against the petition for misjoinder; but, on the contrary, an answer was filed which put in issue plaintiff's claim of heirship in the property in dispute. It appears from the record that the trial court first determined the question of heirship in favor of the plaintiff and quieted her title to an undivided one-half interest in the premises, and, having done so, proceeded to a decree of partition of the lands in conformity with the judgment quieting the title thereto. The court, being possessed of the cause and having all the parties in interest before it for the purpose of quieting the title in the lands, might, unless opportune objections were interposed, proceed to do full equity in the cause by awarding a decree of partition in conformity with the judgment.

This brings us to the real question at issue, which is as to the sufficiency of the proof of plaintiff's heirship. It is apparent, from what has been said, that each of the parties claim as heirs of Daniel Paypay. Defendant's claim of heirship is admitted, and the plaintiff's claim is in dispute. Plaintiff's claim is based on an alleged marriage, according to the custom of the Indian tribe, between Daniel Paypay and a squaw called "Quadan," said to have been celebrated at Redwood, Minn., in the year 1869; the allegation being that plaintiff was the issue of this marriage. The evidence shows that the laws and customs of the Santee Sioux Indian, place slight restrictions on matrimonial alliances between members of the tribe, that polygamy was practiced with

impunity, that the only ceremony requisite was a mutual agreement between the parties to live together as husband and wife, and that this relation might be dissolved by mutual consent at any time, leaving the parties free to marry again at their pleasure. It appears that both Paypay and Quadan were members of the tribe at the time of their marriage, and both had been married under this custom one or more times before they united with each other. But the testimony all shows that, by the rules and customs of the tribe, they were recognized by all the members thereof as husband and wife during the year or more that they lived and cohabited together as such. While there is some conflict in the testimony as to the date of the marriage and the year that they lived together, all of the witnesses connect the time with plaintiff's birth, which, they all say, occurred shortly after Paypay had repudiated the union and came back from Redwood, Minn., to the reservation in Nebraska. There is also evidence in the record showing that Paypay recognized plaintiff as his daughter during his lifetime.

Now it is contended by appellants, that, as the alleged marriage between the father and mother of the plaintiff was polygamous, it was neither valid in the State of Minnesota, where the parties then resided, nor in the State of Nebraska, to which they subsequently removed. This contention would be well founded if this marriage had taken place between citizens of the United States in any state of the Union. But a different rule prevails with reference to the marriages of Indians, who are members of a tribe recognized and treated

with as such by the United States government; for it has always been the policy of the general government to permit the Indian tribes as such to regulate their own domestic affairs, and to control the intercourse between the sexes by their own customs and usages. Consequently, when a member of an Indian tribe becomes a citizen of the United States and subject to its laws, by taking lands in severalty under the provisions of a treaty, as in the case at bar, a liberal rule is applied in determining the legitimacy of any offspring that he may have begotten under the customs and usages of the tribe to which he formerly belonged. The rule so applied is that marriages valid by the law governing both parties when made must be treated as valid everywhere. *Kobogun* v. *Jackson Iron Company* (Mich.) 43 N. W. 605, and cases there cited. The question of the legitimacy of offspring of a marriage of members of this same tribe in Minnesota, under very similar circumstances to those in the case at bar, was before the Supreme Court of that state in the case of *Earl et al.*, v. *Godley et al.* (Minn.) 44 N. W. 254, and it was there said: "An Indian tribe within the state, recognized as such by the United States government, is to be considered as a separate community or people, capable of managing its own affairs, including the domestic relations, and those persons belonging to the tribe who are recognized by the custom and laws of the tribe as married persons must be so treated by the courts, and the children of such mariages cannot be regarded as illegitimate."

We are therefore of opinion that the evi-

dence is sufficient to support the judgment of the ditsrict court, and we recommend that it be affirmed.

Per Curiam—For the reasons given in the foregoing opinion, the judgment of the district court is affirmed.

The case of *Wall* v. *Williams, etc.,* 11 Ala. 826, is another case involving a marriage according to the usages and customs of the Choctaw people. This case arose over the collection of a note given by the wife who was sued, and as a defense she set up that she had been married according to the usages and customs of said Nation. It is useless for me to go into the details of this or another case which I am setting out in full in this brief, because it would be simply a repetition, and the facts in each case are fully set out by the courts delivering these opinions. In that case, the Supreme Court of Alabama, in delivering that opinion, said:

Case of *Wall* v. *Williams, etc.,*
11 Ala. 826.

SYLLABUS.

1. It is not allowable to ask of a witness whether an Indian of the Choctaw tribe became a citizen of Alabama after the laws of the State were extended over the Choctaw territory. A direct answer to such a question is a conclusion of law, which the court should decide from the facts proved.

2. Where a deposition contains a question and answer which discloses illegal testimony, it may be objected to on the trial; but where the objection is to the entire deposition, on the ground that it does not question the competency of the witness, the admissibility of the facts disclosed, or show that it had not been taken in conformity to the statutes, it seems that a motion should be made to suppress it before the cause is put to the jury.

3. The 9th section of the act of 1832, which requires that on contracts made with an Indian, the consideration shall be proved by two credible witnesses, extends not only to Indians of the fullblood, but to the descendants of an Indian woman and a white man.

4. Marriages among the Indian tribes must generally be considered as taking place in a state of nature, and if according to the usages and customs of the particular tribe, the parties are authorized to dissolve it at pleasure, the right of dissolution will be considered a term of the contract; and either party may take advantage of this term, unless it be expressly or impliedly waived by them, or they may perhaps acquire such relations to society as will give permanency to the contract, and take from them the right to annul it.

5. The act of 1832, extending the jurisdiction of this State over the Indian Territory does not take from a marriage between members of the Choctaw tribe its dissoluble quality at the pleasure of the parties; nor can the asking a reservation under the treaty of Dancing Rabbit Creek, the acceptance of a patent

from the United States for the land embraced by it, and the continued cohabitation in this State for more than five years after the ratification of the treaty, and the departure of the mass of their tribe to the West, have that effect. The concurrence of all these facts will not take from a reservee, his citizenship as a Choctaw—the treaty securing the right of resuming his status in the tribe at pleasure; nor will it warrant the assumption that the marriage was consummated in contemplation of a residence in Alabama.

STATEMENT OF FACTS.

The defendant in error declared against the plaintiff in assumpsit on a promissory note, dated the 18th of October, 1837, by which she promised to pay him on or before the first day of January next thereafter, $133.75. The defendant pleaded: *1.* Non-assumpit. *2.* That the plaintiff ought not to have and maintain his action, &c., because she says that at the time of making the several supposed promises and undertakings in the declarations mentioned, she was the wife of one David W. Wall, to-wit, &c.; and this she is ready to verify, &c. To the second plea, the plaintiff replied that the defendant became the wife of said Wall under the usage and customs of the Choctaw tribe, and while subject to such usage, and in the territory then occupied by said tribe, and before Alabama had extended its jurisdiction over them; and by such usage the wife was entitled to contract as a *feme sole*. That at the time of bringing this action, the said Wall had abandoned the defendant and left the country, and gone to his

tribe without the intention of returning. Whereby the plaintiff avers that by the said usages and customs of said tribe, defendant became a *feme sole*. The defendant rejoined that after the marriage of the parties as aforesaid, according to the Choctaw usages, the said tribe removed west of the Mississippi, and the said Delila and David remained in the said county of Sumter, and became citizens of the State of Alabama, and lived under its laws as man and wife, and have never been divorced. To this rejoinder the plaintiff demurred, and his demurrer was sustained by the court. Thereupon the defendant again rejoined, admitting that the marriage was made as stated in the plaintiff's replication, and traversing the residue. She alleged further, that she became a citizen of the United States under the 14th article of the treaty of Dancing Rabbit Creek, and a citizen of the State of Alabama; and was, and still is the wife of David W. Wall. To this rejoinder the plaintiff also demurred and his demurrer was sustained. An issue was then formed on the replication, and the cause was thereupon submitted to a jury, who returned a verdict for the plaintiff, and judgment was rendered accordingly.

From a bill of exceptions sealed at the defendant's instance, it appears that the defendant lived in the Choctaw Nation in 1828, was the daughter of a fullblood Indian woman and a Frenchman—Wall was one-fourth Indian, and himself and defendant lived together as husband and wife from 1831 until seven or eight years preceding the trial below, when he killed a man, and to avoid a prosecution, left the county and went to his tribe west of

the Mississippi, and has never returned. But defendant has received letters from him, in which he threatened to return and take away her child. Defendant lived in 1842 or '3, where she did in 1828.

Another witness introduced by the plaintiff, stated that he had inquired into and informed himself as to the laws and customs of the Choctaws. The tribe had no written laws. They married and unmarried at pleasure—a man frequently having several wives. When a man found a woman he wished to marry, he made her a present of a blanket, and she became his wife—when he wished to dissolve the marriage, he abadnoned her. The husband took no part of the wife's property by the marriage, and she retained all the rights of a *feme sole.*

It was admitted that the defendant and David W. Wall belonged to the Choctaw tribe, and both obtained reservations of land under the treaty of Dancing Rabbit Creek.

The defendant then offered a patent from the United States, dated 18th December, 1842, conveying to herself and children certain lands under the 14th article of the treaty of Dancing Rabbit Creek. She also read the deposition of one Brashear, stating that the marriage of herself and Wall was considered valid in all respects among the Choctaws—the tribe having jurisdiction at that time over the territory where it took place. Parties were sometimes married according to the laws, usages and customs of the Choctaws by a justice acting under the laws of the United States, sometimes by a captain, parson, or merely by consent of parents. That defendant

and Wall lived together as man and wife about eight years, until July, 1839, and within half a mile of Moscow, Sumter county, Alabama. The deposition contained a question and answer, to which the plaintiff objected, as follows: "Did or did not the said D. Wall and Delila Wall become citizens of Sumter county, after the laws of the State of Alabama were extended over the Choctaw territory which now constitutes Sumter county?" Answer: "The said David W. and Delila Wall became citizens of Sumter county, Ala." The objection was sustained, the question and answer ruled out, and thereupon the defendant excepted.

The defendant then introduced the deposition of another witness, who stated that he was acquainted with the law of marriage among the Choctaws up to 1833; that they were sometimes married by a minister, sometimes by a Choctaw ceremony, and sometimes a man and woman took each other (without ceremony), lived together and were considered man and wife. Marriages were also solemnized by a justice of the peace from an adjoining county. Witness was acquainted with D. W. Wall from 1823 to 1839, at different places, and at his late residence in Sumter county—the defendant had been known to him since 1829—she then lived at the same place in Sumter county, where she continued to reside up to 1844. Defendant and Wall were considered husband and wife by the Choctaws and other persons residing among them; but there was no evidence that they had ever been naturalized according to the laws of the United States in respect to foreigners.

The court charged the jury: 1. That the act of 1832 which required the consideration of contracts made with Indians to be proved by two credible witnesses, applied only to contracts made with Indians of the fullblood; and consequently did not embrace the present case. 2. That a married woman was incapable of making a contract, so as to make herself liable; that, if the defendant and D. W. Wall were married according to the laws and customs of the Choctaws, the marriage would be regarded as valid in this State; but if by those laws and customs a married woman may contract as a *feme sole* and she made the note sued on, she was bound by it, and liable for its payment. So, if by those laws and customs, the defendant and D. W. Wall could dissolve the marriage at pleasure by abandonment, and D. W. W. did abandon the defendant and dissolve the marriage before defendant made the note, then she was bound to pay it. That although the marriage might be valid according to the usages of the Choctaws then in force in their nation, yet the wife had the capacity to contract; provided, that under the Choctaw laws, she retained her property and the rights of a *feme sole;* and she was liable to be sued as a *feme sole,* ir the marriage was dissolved. If the marriage was dissoluble at the pleasure of the husband, its dissolution might be inferred from the abandonment by the husband, and going to his tribe beyond the Mississippi, or elsewhere.

The defendant then prayed the court to charge the jury as follows: 1. If the defendant became a citizen of the United States by the 14th article of the treaty of Dancing Rab-

bit Creek, the laws and customs of the Choctaws were as to the defendant thereby abrogated, during the time that she continued to reside in this country; and her rights as a married woman became subject alone to the laws of this State and the United States. 2. If the defendant became a citizen of the United States, as supposed by the first prayer, and was the wife of D. W. W., she was entitled to all the rights, and subject to all the incapacities of a married woman, and incapable in law of making a promissory note that would be binding upon her. These charges were refused by the court, and the jury were further instructed that the defendant became a citizen of the United States by conquest of the Indian territory, and by the provisions of the treaty of Dancing Rabbit Creek, without herself or her husband ever having been naturalized. Yet the citizenship which the defendant thus acquired did not incapacitate her, if by the laws and customs of the Choctaw nation under which she became the wife of D. W. W., she was capable of making a contract. To all which rulings, and charges given and refused, the defendant excepted, &c.

COLLIER, C. J.:

The question proposed by the defendant below, to her witness, Brashears, and his answer thereto, were rightly excluded by the circuit court. It is the province of a witness to narrate facts, and for the judge to decide the law arising upon them. But here the inquiry addressed to the witness required him to state, what was the status of the defendant and her supposed husband—a conclusion of

law depending upon facts; the fact was matter of proof, but the effect of it was referable to the court. The case of *Spence* v. *Mitchell*, 9 Ala. 744, is unlike the present; there an objection was for the first time made at the trial, to the admissibility of a deposition, on the ground that all the questions proposed to the witnesses were not fully answered. We held, that as the deposition was regularly taken, the witness competent, and the facts disclosed admissible, the motion to suppress came too late. See also, *Carter* v. *Mannings & Jackson*, 7 Ala. 851. In the case before us, the deposition was not suppressed, but a single question and answer which were in themselves inadmissible, were excluded. It is the duty of the court to protect the jury against the admissions of illegal evidence, when it is objected to, no matter through what medium it is offered.

It is enacted, by the 8th section of the act of 1832, "to extend the jurisdiction of the State of Alabama, over the territory according to the geographical boundaries within the limits of said State, and for other purposes," "that in all cases where the suit is brought on contracts hereafter made, to recover money or property from any Indian, the consideration shall be proved by two credible witnesses." It is insisted by the counsel for the plaintiff below, and was ruled by the circuit court, that this section applies alone to Indians of full-blood. This conclusion is rested upon the assumption that the legislature by using the terms, "Indian, or persons of mixed blood, descended of Indians," in the fourth section, recognized two distinct classes, and as Indians are alone mentioned in the ninth section, those

of mixed blood are excluded from its operation. If our legislative acts were drawn with a punctilious regard to exactness of expression, the argument would be more potent; but we all know that the different sections of a statute are not always written by the same hand, and this will frequently account for a change of phraseology, from general to special terms, and *vice versa.*

The fourth section concedes to "Indians, or persons of mixed blood, descended of Indians," the right to perpetuate testimony, to record "wills, and bills of sale and conveyances, with the testimony of such persons." By the fifth section, white persons living in the Indian country are made subject to the laws applying to white persons living in any other part of the State. The second section authorizes the court of revenue and roads in any county embracing a portion of the Indian territory, to cause such roads, bridges and ferries to be established within the same as the public good requires. By the third section, Indians are exempted from working on the roads, from performing military duty, and serving on juries; and it declares that no tax shall be assessed or collected "from any Indian, or person of mixed blood descended of Indians," residing in this state. The sixth and seventh sections abolish the laws, usages, and customs of the Creek and Cherokee Nations of Indians within this State, contrary to the constitution and laws of the same; and it is made penal for either of these tribes, by "any Indian or Indians," to meet in council, &c., and make such laws for the government of the same. And the fourteenth section de-

clares, that any contract freely and voluntarily made in writing, &c., whereby any white man shall purchase an improvement, &c., "of any Indian, on any of the unceded territory," &c., "shall be obligatory on the parties to such contract."

We cannot think the general term "Indians," was used in a literal or restricted sense, or intended to indicate a class of persons distinct from "persons of mixed blood, descended of Indians;" but these latter terms were used as *ex majore cautela*, by the draftsman of the section, or the part of it, in which they are found. They are mere expletives, and do not enlarge the operation of the act. The word "Indians," is sufficiently expansive to embrace them. It will not be contended that the third section, in exempting Indians from the performance of military duty, working on roads, or serving on juries, applies exclusively to those of the full-blood; or that a Creek or Cherokee of mixed blood could not be prosecuted and punished under the seventh section for meeting in council, &c., and making laws for the tribe, contrary to the laws and constitution of this State. And there is quite as little pretense that the provisions of the fourteenth section are to be limited to purchases made of Indians of unmixed blood.

In common parlance, the word "Indians" includes not only those who have no admixture of blood with the white or negro races, but those descendants of Indians who have become thus mixed, yet retain their distinctive character as members of the tribe from which they trace their descent. The treaty with the Choc-

taws in 1830, gives to "each Choctaw head of a family being desirous to remain and become a citizen of the State," &c., six hundred and forty acres of land; and this has been held to embrace not only Indians of full, but those of mixed blood also.

The object of a requisition upon a party contracting with an Indian, was, in the language of the court of errors of New York, "to save the Indians from falling victims to their own weakness, and to the superior intelligence, and sometimes to the cupidity of the whites." The statute was intended "as a guard against the imposition and frauds to which that unfortunate race of men are exposed from their ignorance and mental debasement." *Goodell* v. *Jackson*, 20 Johns. 720 (11 Am. Dec. 351). The ignorance of the half-breed is in general quite equal to that of the Indian whose blood is unadulterated, and certainly requires the same protection for his rights. So far, then, as the reason of the enactment we are considering is concerned, they both come within its spirit, and we have seen that the language employed is sufficiently comprehensive to embrace them. It therefore follows that the charge of the circuit court, in limiting the operation of the act of 1832, misapprehended the law. See *Pack* v. *Pack*, 9 Port. 297.

The 14th article of the treaty referred to, is as follows: "Each Choctaw head of a family being desirous to remain, and become a citizen of the States, shall be permitted to do so, by signifying his intention to the agent within six mnoths from the ratification of this treaty, and he or she shall thereupon be entitled to a reservation of one section of six

hundred and forty acres of land, to be bounded by sectional lines of survey; in like manner shall be entitled to one-half that quantity for each unmarried child which is living with him over ten years of age; and a quarter section to such child as may be under ten years of age, to adjoin the location of the parent. If they reside upon such lands, intending to become citizens of the States, for five years after the ratification of this treaty, in that case a grant in fee simple shall issue; said reservation shall include the present improvement of the head of the family, or a portion of it. Persons who claim under this article shall not lose the privilege of a Choctaw citizen, but if they ever remove, are not to be entitled to any portion of the Choctaw annuity." 7 U. S. Stats. by Peters, 335. It would perhaps have been more correct if the treaty had employed the term "inhabitant" or "resident," instead of "citizen of the States," as Indians cannot, consistently with the constitution and laws, be invested with all the rights, and bound to all the duties of citizens. But no consequence can result from the inaccurate use of a word in this instance, for the reservee who resided upon his reservation for five years after the treaty was ratified, intending to become a citizen, &c., was entitled to a grant in fee simple; yet by his claim of land he was "not to lose the privilege of a Choctaw citizen." Having obtained a title to his reservation, he could sell or abandon it at pleasure; his citizenship as a Choctaw never having been lost, it might be resumed without any other prejudice than the loss of his interest in the Choctaw annuity. The fact, then, that the defendant and her sup-

posed husband had received patents for lands under the fourteenth section of the treaty, does not make them citizens; a grant to an Indian, or a foreigner, does not change his political or civil condition; either of them are competent to hold land under a treaty, or a legislative grant. 20 Johns 693 (11 Am. Dec. 351). It may be asked, as in the case here cited: Do our laws allow "Indians to participate equally with us in our civil and political privileges? Do they vote at our elections, or are they represented in our legislature, or have they any concern as jurors or magistrates, in the administration of justice? Are they subject to our laws of marriage and divorce, and would we sustain a criminal prosecution for bigamy, if they should change their wives or husbands at pleasure, and according to their own customs, and contract new matrimonial alliances? I apprehend that every one of these questions must be answered in the negative;" at least so long as they continue a distinct and independent community.

In *Wall* v. *Williamson*, 8 Ala. 48, it was held that a marriage between a man and woman of Choctaw extraction and belonging to that tribe of Indians, according to their usages and customs, and before they were superseded by the laws of Alabama, will be recognized as valid. Further, that if by the Choctaw law, the husband took no part of the wife's property, the wife must as a necessary consequence retain the capacity to contract, yet she could not be sued in a court of law while the marriage continued. The question is left open whether the husband could dissolve the marriage by the abandonment of his wife,

if they continued to reside in Alabama after their tribe had departed, but it is said to be "very clear that the same effect must be given to a dissolution of the marriage by the same law. By that law it appears the husband may at pleasure dissolve the relationship. His abandonment is evidence that he has done so. We conceive the same effect must be given to this act as would be given to a lawful decree in a civilized community dissolving the marriage. If the marriage was by the Choctaw law dissoluble at the pleasure of the husband, and was dissolved by his abandonment, then the wife could be sued as a *feme sole*. Lastly, abandonment was inferable from the fact of the husband leaving his wife, and going with his tribe west of the Mississippi. See, also, *Morgan* v. *McGhee*, 5 Hump. 13; *Hantz* v. *Sealy*, 6 Bin. 405; *Fenton* v. *Reed*, 4 Johns. 52 (4 Am. Dec. 244); *State* v. *Murphy*, 6 Ala. 765, (41 Am. Dec. 79), and cases there cited.

The decision in Eighth Alabama Reports, covers almost the entire branch we are now considering of the case before us, and we think, if the jury affirm the truth of the facts stated by the witnesses at the trial, the defendant may be sued as a *feme sole*. It is said, "the characteristic features of the marriage contract is its permanency; for although it originates in the will of the parties, yet after being contracted, the duration of the union is wholly independent of the will of the parties." Shelf. on Marriage and Divorce, 3. But when a man and woman agree to cohabit for an indefinite period as husband and wife, "that in a state of nature, would be a marriage, and in the ab-

sence of civil and religious institutions, might safely be presumed to be, as it is popularly called, a marriage in the sight of God." It has been made a question how long the cohabitation must continue by the law of nature—whether to the end of life. In answer to that inquiry it is said, "that it cannot be a mere casual and temporary commerce, but must be a contract at least extending to such purposes of a more permanent nature in the intention of the parties. The contract thus formed in the state of nature, is adopted as a contract of the greatest importance in civil institutions, and it is charged with a vast variety of obligations merely civil. Id. 9. Marriages among the Indian tribes must be regarded as taking place in a state of nature, and if according to the usages and customs of the particular tribe, the parties are authorized to dissolve it at pleasure, the right of dissolution will be considered a term of the contract. Either party may take advantage of this term, unless it be expressly, or impliedly, waived by them, or they may perhaps acquire such relations to society as will give permanency to the contract, and take from them the right to annul it.

It will be observed, that the cohabitation of the defendant and D. W. Wall commenced previous to the extension of the jurisdiction of this State over the Indian territory, by the act of 1832; that this enactment abolished only the "laws, usages, and customs of the Creek and Cherokee Nations of Indians"—leaving those of the Choctaws in full force, except so far as they might interfere with the exercise of the jurisdiction conferred upon the tribun-

als of the State. There is, then, nothing in the statute which takes from the contract its dissoluble quality by act of the parties—nor can the asking a reservation under the treaty, the acceptance of a patent from the United States for the land embraced by it, and the continued cohabitation in this State for more than five years after the ratification of the treaty, and the departure of the mass of their tribe to the West, have that effect. We have seen that all these cannot take from the defendant and D. W. Wall their citizenship as Choctaws. The treaty secures to them the right of resuming at pleasure their status in the tribe, without reference to time. It cannot in this view of the case be assumed, that the marriage was consummated in contemplation of a residence in Alabama, so as to make this State the matrimonial domicile, and its laws govern the relation of the parties. Considering the character of the Indians, their disposition to renounce native habits and associations, the residence of the parties, &c., such an assumption cannot be indulged.

This exposition of the law applicable to the pleading and facts stated in the record, may suffice to guide the action of the circuit court on a future trial. We will not stop to consider with particularity the questions arising upon the pleadings, or the charges asked or given to the jury, farther than has been already done. In limiting the operation of the 9th section of the act of 1832, to Indians of fullblood, we have seen that the law was incorrectly ruled; the judgment is therefore reversed, and the cause remanded.

This case seems to have been before that same court before, and is reported in the 8th Ala. 43, where the same court observed:

Case of *Wall* v. *Williamson*,
8 Ala. 48.

SYLLABUS.

1. A marriage between two Indians, belonging to the Choctaw tribe, entered into according to the laws and customs of that tribe, at a place where such laws and customs were in force, is recognized as a valid marriage, by the laws of Alabama, the laws of Alabama having been extended over the territory where the parties so married resided. An exception to the general rule, that a valid marriage is so everywhere, is said to obtain with respect to incestuous or polygamous marriages, when asserted in the Courts of a Christian State; but however this may be, it cannot obtain with respect to the wife of a Choctaw Indian, unless it is shown there was a previous marriage.

2. The laws and customs of the Choctaws were not abrogated, so far as members of the tribe were affected, by the extension of the jurisdiction of the State over the country occupied by them. It is only by positive enactments, even in the case of conquered or subdued nations, that their laws are changed by the conqu. ror, but there is no merger, until one tribe or nation is swallowed up, or lost in another, by the efflux of time.

3. When, by the laws of an Indian tribe, the husband takes no part of his wife's prop-

erty, it is a necessary consequence that the wife retains the capacity to contract, and it is likely means were provided by their laws for the enforcement. But if such was the case, it is not perceived how the wife could, in our Court of law, be sued alone, so long as the marriage continued, as the case presented would be that of a wife with a separate estate.

4. When, by the law of an Indian tribe, the husband has the capacity to dissolve the marriage at pleasure, and his abandonment of his wife, he remaining within the jurisdiction of his tribe, is evidence that he has done so, the effect of this dissolution of the marriage is the same as if directed by a lawful decree.

STATEMENT OF FACTS.

Assumpsit, by Williamson, against the defendant as the maker of a promissory note. At the trial, upon the general issue, the defendant produced evidence tending to prove that she and one David Wall lived together as man and wife from the year 1831 until the year 1839, in the territory belonging to the Choctaw Indians, until that was annexed to and made the county of Sumter; after which they lived in the same relation, in that county, near the same place where they previously had resided, and until the said David left the State of Alabama, in 1839, and went to the Choctaw country, west of the Mississippi. Both were of Indian extraction, and of the Choctaw tribe; that they were regarded as man and wife by the tribe, and as having been properly married, according to the laws and customs of the Choctaws. The defendant had said that she had been advised that she had not been legally married;

that she had been married in the Choctaw territory by one Pistole, a justice of the peace from Marengo county. It was also in proof that, by the laws and customs of the Choctaws, the husband by his marriage, takes no part of his wife's property; that among them, a man takes a wife at pleasure, and dissolves the marriage whenever he pleases, and that the men are allowed a plurality of wives. Upon this state of proof, the defendant requested the Court to instruct the jury that a marriage under the laws and customs of the Choctaws, entered into in a place where such laws and customs are in force, is recognized as a valid marriage by the laws of Alabama, when the same are extended over the territory where the parties so married reside.

This was refused, and the Court charged the jury: 1. That the living together of an Indian man and woman would not be regarded by the laws of this State, as such a marriage as would affect a contract entered into by the female. 2. That if the defendant was abandoned by Wall, and she executed the note after he had left her, that she would be bound by her contract, although she might have been married. 3. That if, according to the customs among the Choctaws, the parties to a marriage can dissolve it at pleasure, by mere separation, and that the defendant and Wall did so separate, then the defendant was liable on her contract as a *feme sole*.

The defendant excepted to the refusal of the Court to give the charge requested, as well as to those given, and error is assigned upon the bill of exceptions.

GOLDTHWAITE, J.:

Previous to entering upon the consideration of the questions raised, by the refusal to give the charge requested by the defendant, it is not improper to ascertain what facts had to be ascertained by the jury from the evidence. The existence of a marriage between David Wall and the defendant, at the time when the note sued on was given by Mrs. Wall, was one of the principal matters to be passed upon. Once established to the satisfaction of the jury as having been entered into, in conformity with the usages of the Choctaw tribe of Indians, its effect, in connection with the laws of this State, became a very material subject of inquiry. The defendant insisted then, and now, that if this marriage was valid, by the laws and usages of the Choctaw tribe of Indians, it is recognized as valid by the laws of Alabama. The validity of the marriage, and not the consequences of it, as to the defendant, was at that time the subject for instruction. If the marriage is not to be recognized as valid by our law, it was of no consequence to the defendant, what further charge was given, for or against her, because her entire defense rested on sustaining that proposition. All the testimony in relation to rights of husband and wife, under the Choctaw law, may have been of a disputable or doubtful nature. These observations are called for because it has been assumed that this charge was immaterial, and that all the case is covered by the charge actually given by the Court.

1. With respect to the refusal of this charge, it is not unlikely that the Circuit Court intended to be understood by the counsel, that the charge was refused, not as an incorrect

proposition, but for the reason that the case was clear for the plaintiff, even if it was conceded. If such was the impression of the Court, the charge should have been given, with the necessary explanation to direct the jury to the consideration of those points deemed to be more material. The general rule upon this subject is, that a marriage, valid at the place where contracted, is deemed to be valid everywhere else. Story Confl. of Laws, 77 Sects. 79, 103, 113 a. It is said by the same author, that the most prominent, if not the only exceptions to this rule, are those marriages involving polygamy and incest. Ib. Sec. 113, a, 114.

These the learned author says, Christianity is understood to prohibit, and therefore no Christian country would recognize polygamous or incestuous marriages. Lord Brougham, in *Warrender* v. *Warrender,* (cited in a note to §114, 9 Bligh. 112) says, "it is important to observe, that we regard it, (marriage) as a wholly different thing, a different status from Turkish or other marriages among infidel nations; because we clearly never should recognize the plurality of wives, and consequent validity of second marriages, standing the first, which second marriages, the laws of those countries authorize and validate." If this doctrine is to be understood as leading to the conclusion, that a Court can collaterally inquire into the existence of such a relationship, as would, in a direct proceeding, annul the marriage, it is very questionable whether it is sustainable. *L. Black,* Com. 434. A parallel case, to a Turkish, or other marriage in an infidel country, will probably be found among all our savage tribes, but can it be possible,

that the children must be illegitimate, if born of the second or other succeeding wife? However the true rule may be; it is immaterial to this case, unless it can be shown, that when the law tolerates polygamy, there can be neither lawful wife or legitimate children, for here, the evidence does not disclose any previous marriage.

The validity of the marriage may possibly have been denied upon the impression, that having been contracted within the territorial limits of the State, it cannot be affected by Choctaw usages or customs, though both parties were of that tribe, and residents within its bounds.

2. The refusal cannot be sustained on this ground. Waiving the consideration of the peculiar relation which these Indian tribes bear to the States, within the limits of which they were resident, and assuming that the individuals composing the tribes could, by the States, have been made subject to their general laws, the question yet remains, whether, at the time of this supposed marriage, the laws and usages of the Choctaw tribe had been abolished or superseded; or, whether they composed a distinct community, governed by their own chiefs and laws. It is not pretended, that any statutes producing this effect was then passed, and therefore, if lost at all, their local laws must have been lost, in consequence of their living within the territorial limits of the States. It may be difficult to ascertain the precise period of time when one nation, or tribe, is swallowed up by another, or ceases to exist; but until then, there can not be said to be a merger. It is only by positive enactments,

even in the case of conquered and subdued nations, that their laws are changed by the conqueror. The mere acquisition, whether by treaty or war, produces no such effect. It may therefore be considered, that the usages and customs of the Choctaw tribe continued as their law and governed their people at the time when this marriage was had. The consequence is, that if valid by those customs, it is so recognized by our law.

For that error, in refusing thus to charge, the judgment must be reversed, and the cause remanded.

3. But although this result is arrived at, it yet remains necessary to ascertain what further instruction ought to have been, or should be given. The evidence tended to show, that by the Choctaw law, the husband takes no part of the wife's property. A necessary consequence of this capacity to contract, for otherwise she would be incapable, in many instances, to preserve or protect her property. The bill of exceptions is silent as to any positive law among them, as to this point, but the inference is direct and immediate, from what was proved. Having, by their law, the capacity to contract it is also likely that means were provided by it, for its enforcement; but if that was the case, we do not see how she could be sued, in a Court of law, so long as the marriage continued. It would present nothing, but the case of a wife with a separate estate to her own use. It may be possible that the objection to the form of action could not be urged at the trial, but it is unnecessary to consider this point further, because we are clear, that the marriage was dissolved according to the Choc-

taw usages, by the abandonment of the husband.

4. Whatever may have been the capacity of the husband to abandon his wife, and thereby dissolve the marriage, if both had become residents of Alabama, after the tribe had departed from its limits, it is very clear that the same effect must be given to a dissolution of the Choctaw law as given to the marriage by the same law. By that law, it appears the husband may at pleasure dissolve the relation. His abandonment is evidence that he has done so. We conceive the same effect must be given to this act, as would be given to a lawful decree in a civilized community, to dissolving the marriage. However strange it may appear, at this day, that a marriage may thus easily be dissolved, the Choctaws are scarcely worse than the Romans, who permitted a husband to dismiss his wife for the most frivolous causes. *Story Conf. of Laws,* 169.

The jury then, should have been instructed, that notwithstanding the marriage, if contracted according to Choctaw usage, between members of the tribe, in their own territory, before their laws were abrogated, was valid, yet in case of a valid contract, was liable to be sued as a *feme sole,* if the marriage could, by the Choctaw law, be dissolved by the husband, at his pleasure, and was so dissolved, which might be inferred, if the husband abandoned his wife, and went with his tribe beyond the Mississippi or elsewhere.

Judgment reversed and remanded.

The case of *Johnson* v. *Johnson*, 30 Mo. 72, was a controversy arising out of the estate of Johnson valued at about one hundred thousand dollars. Johnson was governmental official and while in the discharge of his duties took up with an Indian girl and lived with her for years, and had three daughters. He educated these children, took them into his home until they were married and left a will by which he provided for them again. After living with their mother for several years he sent her back to her tribe and married another woman. This controversy involved the legality of that marriage and the legitimacy of these children. In delivering the opinion in that case, the Supreme Court of Missouri said:

Case of *Johnson* v. *Johnson's Adm'r et al.*, 30 Mo. 72.

SYLLABUS.

1. Among the savage tribes of North American Indians marriage is merely a natural contract, and neither law, custom nor religion has affixed any conditions, limitations or forms other than those which nature herself has prescribed.

2. Permanency is not to be regarded as an essential element of marriage by the law of nature; otherwise all such connections as have taken place among the various tribes of the North American Indians—either between persons of pure Indian blood, or between half breeds, or between the white and Indian races

—must be regarded as illicit and the offspring illegitimate; for it is well established that in most of the tribes, perhaps in all, the understanding of the parties is that the husband may dissolve the contract at his pleasure. The power of divorce in one or both of the parties to a contract of marriage at his or her pleasure, is not inconsistent with the law of nature.

3. A mere casual commerce between the sexes does not constitute a marriage by the law of nature; but where there is a cohabitation by consent, for an indefinite period of time, for the procreation and bringing up of children, that, in the state of nature, would be a marriage.

4. It is well settled, as a general proposition, that a marriage, valid according to the law of custom of the place where it is contracted, is valid anywhere.

5. Where the legitimacy of children is called in question, especially after their death, and after a great lapse of time, every reasonable presumption should be indulged in favor of legitimacy; very slight circumstances are sufficient to authorize a court or jury to find the existence of a marriage.

6. By the statute law of this state "the issue of all marriages deemed null in law, or dissolved by divorce, shall be legitimate;" (R. C. 1845, 1855, tit. *Descents and Distributions;*) hence, upon an issue of legitimacy, the inquiry is limited to the mere fact of a marriage *de facto*, and in this investigation the jury are bound to make every intendment in favor of the legitimacy of the children not necessarily excluded by the proof.

7. Where a white man, living in the Indian country, introduced an Indian woman into his family, cohabited with her and became the father of children by her, assumed and discharged parental duties toward those children, provided liberally for their education, introduced them into his household upon his subsequent marriage with another woman, secured their recognition in the social circle in which he moved, and their marriage as his daughters, made liberal provisions for them in his will, and solemnly recognized them as his children in that instrument—no question being made as to their legitimacy during the life of the father—*Held,* that all these circumstances constituted presumptive evidence of a marriage with the Indian woman, when its existence was questioned nearly fifty years after it is alleged to have taken place, when two of the children were dead leaving heirs, and the father also died without leaving any other children. *Held, further,* that the fact, that after cohabiting with the Indian for years, the white man separated from her and sent her back to her tribe, could have no tendency to overthrow the presumption of a marriage arising from the previous cohabitation and other circumstances, if such separation and sending away were consistent with the usages among the Indians, not only in reference to their own marriages, but to intermarriages with the traders who sojourned with them. It is a right conceded to the husband by the terms of the contract, and its exercise cannot therefore be regarded as inconsistent with it.

NAPTON, J.:

This case was here before on a demurrer to the petition and the decision of the court will be found reported in 23 Mo. 561.

When the case returned to the land court, an answer was filed by the adult defendants, setting up the antenuptial settlement as an equitable bar to the claim for dower, and denying the several charges, made in the petition, of breaches of the contract and general bad faith on the part of Johnson, and offering to pay the amount of money received by Johnson from his wife upon their marriage, as specified in his will, and whatever additional money might appear upon investigation to have belonged to the plaintiff originally, and to have been received by the testator.

This part of the answer, which tendered compensation of breaches of the antenuptial contract in the event that such breaches should be found by the court, was stricken out, and the court directed an issue to be tried by a jury: "whether John W. Johnson died without descendants in being capable of inheriting his estate." This issue was found, under instructions from the court, for the plaintiff, and the court, proceeding to a final hearing of the cause, found all the facts in conformity to the allegations of the petition, and gave judgment for the plaintiff, in accordance with her claim under the third section of the act of 1845 concerning dower, for one-half in fee of all the deceased husband's real estate subject to his debts. After commissioners had been appointed to admeasure dower under this judgment, and had reported, a final judgment was en-

tered to the same effect, and damages were assessed at $7,420.11.

The question of most importance which presents itself in the outset of this case, is the one which arises upon the instruction given to the jury upon the trial of the issue of legitimacy. That instruction is, "unless the jury find that John W. Johnson, and the Indian woman with whom he cohabitated, mutually agreed to live their whole lives together in a state of union as husband and wife, it was not a marriage, nor are the children of such union capable of inheriting from the father."

Col. Johnson, it appears from the testimony taken at the trial, was a government factor at Prairie du Chien in 1812, at that time a military post in the Indian country, and outside of the limits of any state. Whilst there, he formed a connection with an Indian woman, the daughter of a chief named Keokuk, with whom he lived for several years, and by whom he had three children, daughters, named Rosella, Mary, and Eliza. These children were brought up and educated by Col. Johnson in conformity to his circumstances and condition in life: were introduced into society, after their education was finished, as his daughters; remained inmates of his household after his removal to St. Louis in 1822, up to the period of their marriage, and were in all respects treated by him as a father would be expected to conduct himself towards his legitimate children, and were finally provided for in a will, which left to them or their descendants the bulk of his fortune, which amounted to about one hundred thousand dollars.

Shortly after his removal to St. Louis, Col. Johnson married the plaintiff, having left the mother of these children with her tribe, and it not appearing from the testimony whether she was living or not at the time of the marriage with the plaintiff. Some testimony was given at the trial explanatory of the custom of the Indians in relation to their marriages. It seems that there were connections formed between the traders and the Indian women, which were regarded as marriages, and others which the witnesses did not so consider. What were the characteristics which distinguished the one from the other did not clearly appear; but there was no evidence that in either case the husband was not regarded as at liberty to leave his wife at his pleasure. Some of the witnesses testified in relation to the ceremonies which sometimes accompanied a marriage. There was no evidence in relation to the origin of the connection between Col. Johnson and Tapissee (the woman with whom he lived), nor did it appear what the nature of the contract was between them, except as it was to be inferred from the facts stated above.

There is no doubt that permanency enters into the idea of marriage as understood among all civilized and Christian people, and the proposition stated in the instruction of the land court is undoubtedly well sustained by writers who have discussed the subject of marriage. It may be further conceded that, even by the law of nature, a mere casual commerce between the sexes does not constitute a marriage. But when there is a cohabitation, by consent, for an indefinite period of time,

for the procreation and bringing up of children, that, in a state of nature, would be a marriage; and, in the absence of all civil and religious institutions, may safely be presumed to be, as it is termed by some writers, "a marriage in the sight of God." (*Selford on Marriage & Div.* p.———) "It has been made a question," says this author, "how long the cohabitation must continue by the law of nature, whether to the end of life. Without pursuing that discussion, it is enough to say that it cannot be a mere casual and temporary commerce, but must be a contract at least extending to such purposes of a more permanent nature in the intentions of the parties." (*Id.* p. 9.)

If permanency is to be regarded as an essential element of marriage by the law of nature, it is clear that all such connections, which have taken place among the various tribes of North American Indians, either between persons of pure Indian blood, or between half breeds, or between the white and Indian races, must be regarded as a mere illicit intercourse, and the offspring be considered as illegitimate; for it appears to be well established by historians and travelers, as well as by the reported testimony in judicial proceedings occurring in the courts of some of our states, that in most of the tribes, perhaps in all, the understanding of the parties is that the husband may dissolve the contract at his pleasure. In a work published by Mr. Schoolcraft concerning the manners and customs of the North American Indians, the writer says: "The martial rite is nothing more among our tribes, than the personal consent of the part-

ies, without requiring any concurrent act of a priesthood, or magistry, or witnesses; the act is assumed by the parties without the necessity of any other extraneous sanction except parental consent. Presents are, however, often made, if the parties are able. *It is also disannulled and the wife dismissed from the wigwam whenever the husband pleases,* or the marital state is continued under the evils of discord or a state of polygamy. The latter is however the usual method among the hunter and prairie tribes. But the ties of consanguinity are still strictly acknowledged; children become possessed of all their natural rights, and family tradition traces these to their remotest links." In Robertson's History of America, (book 4), the same peculiarity is noticed as characterizing the contract of marriage as it prevailed among the natives of South America.

In the case of *Wall* v. *Williamson*, 11 Ala. 839, it appeared in evidence that, by the Choctaw law, the husband could dissolve the relationship at pleasure, and a marriage of this kind, within the limits assigned to that tribe, was held valid. The court says that "marriages among the Indian tribes must be regarded as taking place in a state of nature; and if, according to the usages and customs of the particular tribe, the parties are authorized to dissolve it at pleasure, the right of dissolution will be considered a term of the contract. Either party may take advantage of this term, unless it be expressly or impliedly waived by them; or they may perhaps acquire such relations to society as will give perman[illegible]o the contract and take from them the r[illegible] avoid

it." The same doctrine had been held by the court in the same case, reported in 8 Ala. p. 48.

In Tennessee, a marriage among the Cherokees, according to the usages of that tribe, within the limits of that state, was held valid. And it appeared that all that was necessary to constitute a marriage by these usages was a public agreement to live together as man and wife, and the fact that two persons did so live together was considered evidence of such agreement. In this case (*Morgan* v. *McGhee*, 5 Humph. 14,) the husband was a white man, and there were children of the marriage, and the supreme court, in passing on the case, observed: "To hold this marriage to be void would be to vitiate all the marriages made in the nation, (Cherokee,) and might be productive of much mischief." Proceeding, therefore, on the principle that the courts in Tennessee would recognize as valid all marriages of a foreign country made in pursuance of the forms and usages of that country, they applied the doctrine to a marriage between a white man and an Indian, made within the Indian Nation, conformably to the customs of the tribe.

Judge Story, in his work on the Conflict of Laws, considers marriage, as in its origin, a contract of natural law; that "it is the parent and not the child of society;" that in all civilized countries it becomes a civil contract regulated by law, and in many has superadded to it a religious obligation. So that the contract is a natural, civil or religious one, or embraces all these elements, according to the condition of society in which it occurs. It is plain that, among the savage tribes on this continent, marriage is merely a natural con-

tract, and that neither law, custom nor religion has affixed to it any conditions or limitations or forms other than what nature has itself prescribed. It can hardly be said that the power of divorce, in one or both of the parties to the contract, at his or her pleasure, is inconsistent with the law of nature. The fact, as we have seen, is otherwise. To what quarter shall we look for proofs of the laws of nature, if we exclude the manners and customs of the American aborigines?

It is well settled, as a general proposition, that a marriage, valid according to the law or custom of the place where it is contracted, is valid everywhere. (Story's Conf. of Laws, Sec. 113; 2 Greenl. Ev. Sec. 460.) It is equally clear, both upon authority and upon general principles of public policy and natural equity, that where the legitimacy of children is called in question, especially after their death and after a great lapse of time, every reasonable presumption is indulged in favor of legitimacy. Very slight circumstances have been held sufficient to authorize a court or jury to find the existence of a marriage. In the case of *Johnson* v. *Johnson*, 1 Dessaus, 595, the testator had used an expression in his will which had a tendency to create a doubt as to his son's legitimacy; and the only proof to remove the suspicion was the simple fact that the father and mother had lived together as husband and wife, and were so considered in the neighborhood. Thirty years had elapsed, and all the parties were dead, and the illegitimacy of the son would let in the collateral relations of the deceased. The Court of Chancery declared that "to bastardize a person af-

ter his death was contrary to every principle of law, justice and equity," and decreed accordingly in favor of the legitimacy of the son.

Where there has been a marriage *de facto*, and the parties to it are dead, although no direct proceeding can ever be had to invalidate it, yet if children have sprung from the union, the question of their legitimacy may incidentally and necessarily involve the validity of the marriage. Our statute has, however, even in such cases, precluded the necessity of any inquiries of this sort, by declaring the issue of all marriages deemed null in law to be legitimate. Under our law, upon an issue of legitimacy, the inquiry is limited to the mere fact of actual marriage; and upon this investigation, confining ourselves to the rules of evidence established before this significant change in the law, the jury are bound to make every intendment in favor of the legitimacy of the children not necessarily excluded by the proof. (*Senser et al.*, v. *Bower and Wife*, 1 Penrose & W. 452.) In the case of *Cheseldine, lessee*, v. *Brewer*, 1 Harr. & McH. 152, upon a question of legitimacy, the jury were instructed that if they found the reputed parents of the person claiming as heir had consented and agreed to be man and wife, and had cohabited as such before the birth of the claimant, they should render their verdict for the plaintiff, and this direction of the court was sustained upon appeal. The supposed marriage had occurred in the State of Maryland, and of course, if it had in fact taken place, had been accompanied with the ceremonies and attended with the sanctions, civil and religious, which the laws of that state required.

The separation of Col. Johnson from the mother of his children cannot, under the facts of this case, be regarded as tending to rebut the proof of a marriage. Such a separation, in ordinary cases, occurring between persons of the same race and in a civilized country, is undoubtedly competent evidence to rebut the presumption arising from previous cohabitation. (*Senser* v. *Bower, et al.,* 1 P. & W. 452). But the fact here, if established to be consistent with the usages among the Indians, not only on reference to their own marriages, but to intermarriages with the traders who sojourned with them, could have no tendency to overthrow the presumption arising from the previous cohabitation. It seems to be a right conceded to the husband by the terms of the contract, and its exercise cannot therefore be regarded as inconsistent with it.

The declarations of Col. Johnson, reported by some of the witnesses, as made upon the eve of and perhaps subsequently to his marriage with the plaintiff, that he was a bachelor, are not entitled to any consideration. Such expressions are readily accounted for without being understood as indicating an intention to bastardize his children—an intention contradicted by all the acts of his life in reference to these children. His assumption and performance of parental duties, his care in providing for their education, his introduction of them into his household after his marriage with the plaintiff, their recognition in the social circle in which he moved, their marriage as his daughters, the liberal provisions for them in his will, and his solemn recognition of them in that instrument; all these cir-

cumstances, without any question, so far as the testimony shows, being ever made of their legitimacy during the life of the father, certainly constitute presumptive evidence of a marriage, when its existence is questioned nearly fifty years after it is alleged to have taken place, and when two of the children are dead leaving heirs, and the father is dead without any other children, and his widow is also dead without children, either by her first or second husband.

We have not been able to perceive any good reason for striking out a portion of the defendant's answer, but as the entire evidence in support of the defense is now before this court, the question becomes immaterial. We are satisfied, from the testimony, that the conduct of Col. Johnson has not been such, in reference to the antenuptial agreement with the plaintiff, as to specify a specific performance of that agreement with a view to her exclusion from her legal right to dower. We do not allude to any charges of supposed illiberality to his wife during their marriage union, for there is no good ground for concluding that there was any serious disagreement or ill-feeling between them; but the provisions of the will were certainly inadequate, and not a *bona fide* execution of the contract. And as the testator, whether by consent of his wife or not, thought proper so to invest the money received from her on the marriage, as to be entirely inaccessible to her for any of the uses contemplated by the antenuptial agreement, and it would be extremely difficult, if not impracticable, to trace the fund so used in the improvement of the testator's real estate, and

ascertain its present value, we concur in the conclusion of the land court that the right to dower was not barred.

It will be seen that, in our view of this case, the question of damages becomes immaterial. The death of the plaintiff having been suggested since the case came here, her representatives would be entitled to one-third of the rents and profits of the real estate of which her husband died seized, from the time of his death to the date of the assessment; together with such proportion of the slaves and personal property of the husband as they may be entitled to under the second section of the act of 1845 concerning dower. It is not intended by this opinion to debar the plaintiffs from taking under the antenuptial agreement, but, as the bill is not framed with that view, we consider it unnecessary to notice that branch of the subject.

The judgment is reversed and the case remanded. Judge Scott concurs.

The case of *Boyer, et al.* v. *Dively, Admr. et al.*, 58 Mo. 510, was a controversy over the estate of William Gillis, valued at four hundred thousand dollars. Gillis had married Kahketoqua, the daughter of Laharsh, the Chief of the Piankeshaw Nation, according to the usages and customs of said Indians, and had one child named Nancy. She was the only child of this marriage, and was twice married herself, once to Joseph Boyer, who died, and then to James Charley. Nancy had one child by her first husband named Francis Boyer, and

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one by the second named James Charley, Jr. Nancy died in 1862. Her mother died in 1863, leaving William Gilliss, who also died in July, 1869, leaving a will by which he left his property to Mary A. Troost. A controversy arose over this will, in which this marriage was brought into consideration and the legitimacy of these two grandchildren, Francis Boyer and James Charley, the children of the daughter, Nancy. The same learned Judge Napton, who delivered the other opinion cited from Missouri, said:

Case of *Boyer et al.* v. *Dively, Adm'r, et al.*, 58 Mo. 510.

SYLLABUS.

1. A petition, which alleges that plaintiffs are the children of a decedant who left a will, in which no mention is made of them, and prays for distribution according to law, is sufficient. The authority of the Circuit Court to order distribution in such cases attaches before any distribution of the estate, and consequently it is not necessary to allege in the petition that the legacies have been paid and the estate distributed. (*Levins* v. *Stevens*, 7 Mo. 90, affirmed.)

2. Under our statute (Wagn. Stat., 1041, Sec. 13) in contests concerning the construction or validity of wills, the court may frame issues and take the opinion of a jury upon any specific questions of fact involved, although such verdicts are not binding upon the court.

3. Under the customs of Indian tribes,

when a messenger was sent by the intended bridegroom to the parents of the bride with a proposal to take her as his wife according to the Indian custom, and with presents to the parents, and the parents had signified their acceptance, and the bride, with their consent, had returned and cohabited with the suitor, these facts would constitute a valid marriage.

4. The Constitution of the United States, and the statutes passed in pursuance thereof, recognize the Indians as a peculiar people, having relations to the Government totally different from citizens of the States. And although located within State lines, yet, so long as their tribal customs are adhered to and the Federal Government manages their affairs by agent, they are not regarded as subject to the laws, at least so far as marriages and inheritance are concerned. The Constitution of the United States especially authorized Congress to regulate commerce with the Indian tribes as with foreign nations. The customs and laws of the Indians then prevailed among the remnants of tribes located in this State in 1829 and 1830, and would continue unless positively changed by the Legislature of the State, and no such legislation has ever been attempted. A marriage, therefore, among them according to their custom, would for the purpose of inheritance, at least, be valid.

5. When the parents and their offspring are all dead, the presumption is in favor of the legitimacy of the offspring; and in contests concerning wills, where the question arises, it is proper to instruct the jury to that effect.

NAPTON, J.:

This suit was brought under the 9th and 47th sections of the act concerning wills (Wagn. Stat., 1365). The plaintiffs in their petition state that the decedent, William Gillis and Kahketoqua, an Indian woman, child and daughter of Laharsh, a chief of the Piankeshaw Nation or tribe of Indians, in the lifetime of said Gillis, and in the Indian country, about the year eighteen hundred and thirty, were married as husband and wife, and for a long time thereafter cohabited and lived together as such husband and wife, and that there was issue of said marriage, to-wit, Nancy Gillis; that said Nancy was the only issue or child of said marriage; that said Nancy was twice married, first, to Joseph Boyer, who, having died, she was secondly married to James Charley. That plaintiff, Francis Boyer, is the sole child and issue of said first marriage, and plaintiff, James Charley, Junior, is the sole child and issue of said second marriage. That said Nancy afterwards, in the year 1862, died, leaving plaintiffs her only children, issue and heirs. That said Kahketoqua, wife of said Gilliss and mother of said Nancy, died about the year 1863, having had an only child and issue, the said Nancy. That William Gilliss, said decedent, about the 19th day of July, 1869, died, having first made his will. That said Gilliss died, leaving then living, no child or children or descendant of any child or children except plaintiff's children, as before stated, of said Nancy, and grandchildren of said Gillis, and so died, leaving no widow, and that plaintiffs are the only heirs of said testator, Gilliss. Plaintiffs file the will of said

Gilliss and make it part of their petition, and state that by said will defendant, Mary A. Troost, was appointed executrix thereof; that said Mary A. Troost caused said will to be admitted to probate in the Probate Court of the County of Jackson, and took out from said court letters testamentary as the executrix of said will, and was proceeding to administer the estate and execute said will according to the terms and provisions thereof; that by said will testator devised and bequeathed to defendant, Mary A. Troost, the whole of his estate, real and personal, worth four hundred thousand dollars, except two nominal bequests of ten dollars each, which plaintiffs consent shall be paid.

Plaintiffs in their petition, further state that they are descendants and children of said Nancy, who was a child of said testator, William Gilliss; and although such descendants and children, they, the said plaintiffs, are not and were not in or by said will or any of its provisions, named or provided for, nor was nor is said Nancy, mother of plaintiffs, so named or provided for. On the contrary, said will makes no provision for them or either of them, nor are they or either of them mentioned or named in said will.

The petition further alleges that by the law, said testator, as to plaintiffs, his said grandchildren, and their mother, said Nancy, not named or provided for in or by said will, is deemed to have died intestate, and that they, said plaintiffs, are entitled to have such proportion of the estate of the testator, real and personal, as if he had died intestate, and that they are entitled to have the same as-

signed to them. And plaintiffs pray the court to declare and adjudge the intestacy of said William Gilliss as to plaintiffs, and for contribution accordingly from said defendant as executrix and legatee, and for such other and further relief as to the court shall deem right and proper.

The suit, as originally brought, was against Mary A. Troost, as executrix, and also as legatee under the will. Defendant, Mary A. Troost, died, leaving a will by which she disposed of her whole estate, including that derived by her under the will of the said William Gilliss, and the suit was revived against her executors, the defendants, Donnelly and Black.

Defendant, Mary A. Troost, as executrix, and also as legatee, made answer to the petition; and in the answer protested that plaintiffs' petition does not state facts sufficient to constitute a cause of action against defendant as executrix, to be answered unto, nevertheless for answer, defendant in substance states that she had no sufficient knowledge or information to form a belief whether Kahketoqua was the child and daughter of Laharsh, and says it is not true; and she denies that said testator, William Gilliss, and said Kahketoqua, in the lifetime of said William Gilliss, and in the Indian country, about the year 1831, or at any other time were married as husband and wife; denies that they for a long time thereafter or for any length of time, cohabited and lived together as husband and wife. denies that there was any issue of any marriage between Gilliss and Kahketoqua, and says if Kahketoqua did leave a child, it was not lawfully begotten by the testator. Whether said

Nancy was twice married and had children, as stated in the petition, she had no knowledge or information sufficient to form a belief; admits that Gilliss died testate as stated in petition; denies that plaintiffs (or either of them) are the heirs of testators, Gilliss; says it is not true and denies that Gilliss left no legal heirs and representatives other than plaintiffs, and states the fact to be that Gilliss left surviving two legal heirs and representatives, and only two, to-wit, Sophia Gilliss and Mary Gilliss, both named in said will and provided for, and alleges that they are both living; admits her appointment by the will as executrix, that the will was admitted to probate, that letters testamentary were granted her, and that she assumed the burden of administering under the will; says she has no sufficient knowledge or information to form a belief whether plaintiffs are the children of said Nancy, and denies that said Nancy was or that plaintiffs are legal heirs of Gilliss; admits that plaintiffs are not named in said will and that the will makes no provision for plaintiffs or either of them; denies that by the law said testator, as to plaintiffs or either of them, died intestate, and denies that they are entitled to any portion or part of the property, real or personal or mixed, of which said Gilliss died seized or possessed, and asks to be discharged with costs.

To defendant's answer there was a replication by plaintiffs.

In the progress of the cause in the court below, and on the application of Sophia Gilliss and Mary Gilliss, they were admitted as parties defendants. They filed answer in sub-

stance denying plaintiffs' right as asserted, and claiming to be children and heirs of the testator, Gilliss, and entitled to share in the estate, and charging that the defendant, Mary A. Troost, had, by fraud and other means, procured the making and execution of the will, by which they were each cut off with a bequest of the nominal sum of ten dollars.

Portions of the answer were ruled out and the remaining portions replied to by plaintiffs.

In the further progress of the cause, defendant, Mary A. Troost, having died, defendants, Donnelly and Black, as executors of her will, were made defendants, and the suit revived against them. Defendants Donnelly and Black having entered their appearance, with the permission of the court, adopted as their answer the answer of their testatrix, Mary A. Troost.

In the further progress of this cause and at the trial term thereof, and before the jury was called or sworn, the court, on motion of plaintiffs, decided to have prepared for submission to the jury issues upon questions of fact, and under the directions of the court, such issues were accordingly framed, and are as follows:

The court submits to the jury for trial the following issues: First. Were William Gilliss and said Kahketoqua, an Indian woman, married about 1830, and did they live as husband and wife? Second. Did they, the said William Gilliss and Kahketoqua, have issue, and was the said Nancy Gillis the issue and only issue of said marriage? Third. Are the plaintiffs, Francis Boyer and James Char-

ley, Junior, the descendants and only descendants of said Nancy Gilliss? Fourth. Had the said Kahketoqua and Nancy Gilliss died before the commencement of this suit, [*] die, having first made his last will as stated in plaintiffs' petition? Sixth. Did said William Gilliss, the testator, die, leaving plaintiffs, Francis Boyer and James Charley, Junior, descendants of said Nancy, but in his last will omit and fail to name and provide for plaintiffs, or either of them, as descendants of said Nancy Gilliss, and did he also fail and omit to name or provide for said Nancy Gilliss? Seventh. Are the said Sophia Gilliss and Mary Gilliss children and heirs of William Gilliss, and are they both named and provided for in the said will?

The defendants objected to the submission of issues or questions of fact to the jury.

The court overruled defendants' objections, and ruled and decided to call a jury to try the issues of facts as framed, and thereupon a jury was called and sworn, and plaintiffs were about to proceed with their evidence, when defendants, in writing, made and presented to the court their objections to any and all evidence offered or intended to be offered by plaintiffs.

The objections of defendants were by the court overruled and plaintiffs proceeded with their testimony, and the trial of the issue progressed.

The evidence in the case is voluminous and conflicting. It is unnecessary to state it in detail, as the questions of fact were submitted to a jury, under instructions which will be noticed.

The main fact in dispute was as to the marriage of Gilliss with an Indian woman, named Kahketoqua, a daughter of a chief of the Piankeshaws. Gilliss, it seems, had a trading post at the James Fork of White river, among the Delaware tribe of Indians, and had successively two wives, who were Delawares, and acknowledged the children of these wives. About the year 1829 or 1830, he proposed to Laharsh, a Piankeshaw chief, to marry his daughter, named Kahketoqua, and employed a man named Baptiste Peoria to negotiate the marriage. Laharsh was then living at Cowskin creek in the Indian country. This Baptiste Peoria, who is the principal witness for plaintiffs, visited Laharsh and reported favorably to Gilliss, and Gilliss and Peoria then went down to the settlement in Cowskin creek, and carried with them presents to the father and mother of Kahketoqua, which were satisfactory, and returned with Kahketoqua. Nancy Gilliss, the mother of the plaintiff, was the offspring of the cohabitation or marriage. There was evidence to show a subsequent recognition of Kahketoqua and her child, and there was evidence to the contrary.

The greater part of the evidence against the marriage is of a negative character, that is, it is of persons who were about Gilliss' domicile, but who knew nothing of the Piankeshaw woman as his wife. There seems to be no question, that the plaintiffs are descendants of Nancy Gilliss, who was reputed to have been the daughter of the Piankeshaw, wife of Gilliss.

In regard to the custom among the Indians in relation to marriages, there seems to

have been but little conflict of testimony. The contract was arranged with the parents, and, if the presents were satisfactory, the parents usually assented.

Marriages were dissolvable at the option of the parties. In this case Gilliss sent Kahketoqua back, after living with her for a few months, promising, however, to recall her, when he returned from the east. There is evidence that he sent presents to her child, Nancy, the mother of the plaintiffs.

The first, second, third, fourth, fifth and sixth issues the jury found affirmatively and for plaintiffs, and the seventh issue they also found affirmatively.

On the trial, and after the evidence was closed, plaintiffs asked instructions as follows:

1st. "If the jury believe from the evidence, that the testator, William Gilliss, and said Kahketoqua, an Indian woman, about the year 1830 were married in the Indian country and according to Indian usages, and as husband and wife lived and cohabited together, and that there was issue of said marriage and cohabitation, and that said Nancy Gilliss was the issue and only issue of said marriage and cohabitation, and shall further believe that the plaintiffs, Francis Boyer and James Charley, Junior, are the descendants and only descendants of said Nancy Gilliss, and shall further find that said Kahketoqua and Nancy Gilliss died before the commencement of this suit, and shall further find that said testator died leaving his last will as stated in plaintiffs' petition, and so died, leaving plaintiffs, Francis Boyer and James Charley, Junior, descendants

of said Nancy Gilliss, and in his said last will failed and omitted to name or provide for plaintiffs as descendants of said Nancy, and did also fail and omit to name or provide for said Nancy Gilliss, then the jury must find for plaintiffs on the first six issues submitted to the jury."

2d. "If the jury believe from the evidence, that the testator, William Gilliss, took said Kahketoqua, an Indian woman, in the Indian country, about the year 1830, as his wife, according to the usages prevailing among the Indians, and cohabited with said Kahketoqua, and had by her issue, as stated in the petition, then they must find the first issue for plaintiffs."

3d. "If the jury believe from the evidence, that the said William Gilliss, about the year 1830, was married to an Indian woman named Kahketoqua, in the Indian country, according to Indian usages, and had by her Nancy Gilliss. as the issue and only issue of said marriage. such issue is legitimate, although the jury may believe that, by Indian usages, said Gilliss had a right to abandon said Kahketoqua at any time after said marriage, then the jury must find the first two issues for plaintiffs."

4th. The court further instructs the jury, "if you should believe from the evidence, that Nancy Gilliss was the child of William Gilliss and an Indian woman named Kahketoqua, and still further believe from the evidence that Gilliss, Kahketoqua and Nancy are all dead, the legitimacy of said Nancy being called in question, you should give every reasonable

presumption in favor of her legitimacy not necessarily excluded by the evidence."

5th. "It is admitted by the pleadings in this case, that William Gilliss died before the commencement of this suit, leaving his last will, and it is further admitted by the pleadings that said William Gilliss, the testator, in his said last will, failed and omitted to name or provide for plaintiffs as descendants of said Nancy Gilliss, and that he, the said Gilliss, did so fail and omit to name or provide for said Nancy Gilliss in his said last will."

6th. "It being charged and alleged in the answer in this case that said testator, William Gilliss, left surviving, two legal heirs, to-wit, Sophia Gilliss and Mary Gilliss, this is an admission by defendants of the legitimacy of said Mary and Sophia Gilliss."

All of which instructions, from one to six inclusive, were given by the court, and excepted to by defendants, Donnelly and Black. Plaintiffs also asked other instructions, which were refused by the court, and excepted to by plaintiffs.

Defendants asked instructions as follows:

1st. "The court instructs the jury that, as there is no controversy between plaintiffs and defendants as to the fifth and seventh issues submitted to them by the court, it being admitted that, as to the fifth issue, William Gilliss died before the commencement of this suit, he having first made his last will, and, as to the seventh issue, that Sophia Gilliss and Mary Gilliss are children and heirs of said William Gilliss, and are both named and provided for in the said will, the jury will find

said issues in the affirmative, and as to said issues, return the following verdict: 'We, the jury, find the fifth and seventh issues, submitted to us by the court, in the affirmative'."

2nd. "Although the jury may find the third, fourth and sixth issues submitted to them by the court in the affirmative, and may find as to third issue, that plaintiffs, Francis Boyer and James Charley, Jr., are the descendants and the only descendants of said Nancy Gilliss; and as to the fourth issue that said Kahketoqua and Nancy Gillis died before the commencement of this suit, on the 15th day of October, 1869; and as to the sixth issue, that said William Gilliss, the testator, did die leaving the plaintiffs, Francis Boyer and James Charley, Junior, descendants of said Nancy, but in his last will did omit and fail to name or provide for plaintiffs or either of them as descendants of said Nancy Gilliss, and did also fail and omit to provide for said Nancy Gilliss, yet their so finding said third, fourth and sixth issues in the affirmative must in no wise control or influence their finding as to the said first and second issues, and the jury may so find said third, fourth and sixth issues, or any or all of them, in the affirmative, and yet may still find first and second issues in the negative for the defendants."

3rd. "The court instructs the jury that although the jury may believe from the evidence, that said Gilliss and Kahketoqua were actually married according to the usage and custom of the Indians, and did thereafter live and cohabit together as husband and wife for five or six months, and that said Nancy was the issue of such cohabitation, and that plain-

tiffs are the only descendants of said Nancy, and that after such cohabitation said Gilliss sent said Kahketoqua back to her tribe; yet, unless the jury further find from the evidence that at any time of such marriage said Gilliss and Kahketoqua did mutually contract and agree to become and be husband and wife so long as they both should live, to the exclusion of all others, by a mutual obligation, which during the said lifetime of the parties neither one by his or her own volition or act could dissolve, then the jury are bound to find said first and second issues in the negative."

4th. "Although the jury may believe from the evidence that said William Gilliss did take the Indian woman, Kahketoqua, to his house at James Fork Trading Post, about the year 1830, and did cohabit with her for four to six months, and during that cohabitation did beget of her body the child, and that the plaintiffs are the only issue of said Nancy; yet if the jury further believe from the evidence, that said William Gilliss was, prior, during and subsequent to said year 1830, a citizen of the State of Missouri, residing within this State, and that the tribe of the Piankeshaw Indians, of which said Kahketoqua was a member, was at that time living within this State, and that Laharsh, the father of Kahketoqua, and others of his family and a few other families, temporarily crossed over the line of this State, into the Seneca Indian Territory, on a hunting trip, intending, after the hunt was over, to return to their tribe in this State, and that whilst in said Seneca Indian country, said Gilliss crossed over the line of this State to the camp of said Laharsh, in said Seneca

Indian Terrtiory, and then and there, according to the usage and custom of the Piankeshaw Indians in case of marriage, made presents to the parents, Laharsh and wife, and took said Kahketoquah, and immediately thereafter went with her, her mother and brother, to his house at James Fork Trading Post, in this State, and there cohabited with her for several months, and then sent her mother and brother back to their tribe, and did not thereafter live with or treat her as his wife, then in law, there was no marriage between said Gilliss and Kahketoqua, and the jury are bound to find said first and second issues in the negative."

5th. "Although the jury may believe from the evidence, that in the fall or winter of 1829, William Gilliss took the Indian woman, Kahketoqua, in the Indian country, across the line of this state, and there cohabited with her in this State, for four or five months, when they separated, and she went to her people, and that they were thus married in accordance with the usage and customs among the Piankeshaw Indians, and by such cohabitation, there was issue; still, if you believe that at the time Gilliss took Kahketoqua, she was only temporarily across the line with her father, on a hunting expedition, and her people and Gilliss lived in this State of Missouri, that by by such usage and custom, either party had the right to separate at any time, and take another man or woman, and that the man had the right to have two or more such wives at one and the same time, then there was no marriage between the said Gilliss and Kahketoqua, as is required to be shown by plaintiffs

in this case, and you will find the first and second issues in the negative."

6th. "Although the jury may believe from the evidence, that said William Gilliss did go from his house in Missouri to the camp of Leharsh and his wife, the father and mother of Kahketoqua, a Piankeshaw Indian woman, in the Senaca Indian Territory, and did then and there make such presents to them as were usual and customary among said Piankeshaw Indians in case of marriage, and did thereafter take said Kahketoqua, her mother and brother, to his house at James Fork Trading Post, and did there live and cohabit with her for several months, and up to the spring of the year, and during such cohabitation did beget of the body of said Kahketoqua the said Nancy, and did afterwards, in said spring of the year, and before the birth of said Nancy, send said Kahketoqua, her mother and brother, back to their tribe, and did not thereafter live or cohabit with her as his wife; yet these facts alone do not necessarily constitute an actual marriage between said Gilliss and Kahketoqua; and unless the jury find that the plaintiffs have affirmatively proved to the satisfaction of the jury, that the said William Gilliss and Kahketoqua did then and there actually contract and agree, each with the other, to become and to live together as husband and wife, and did thereafter, in pursuance of such contract and agreement, cohabit together, not merely for casual and temporary sexual commerce and gratification, but as husband and wife, for the purpose of that relation for an indefinite time, then the

jury are bound to find said first and second issues (in the negative) for the defendants."

7th. "Unless the jury believe from the evidence, that William Gilliss and Kahketoqua were actually married, and that there was issue of such marriage, you will find the first and second issues in the negative, and in order to constitute marriage, they must have mutually agreed to be and to live together as husband and wife for an indefinite period; that cohabitation and children thereof does not constitute marriage, and if such cohabitation is a casual commerce between the sexes, or for temporary purposes only, it is not even evidence of marriage, but in order to be evidence of marriage they must not only have lived together as man and wife, but must have held themselves out to the world as sustaining that honorable relation towards each other."

8th. "The jury are instructed that if they believe from the evidence, that any witness or witnesses have sworn intentionally falsely to any material fact or facts in the case, then the jury are authorized to disregard and reject the entire testimony of such witness or witnesses."

The first, second, sixth and eighth of which instructions asked by defendants the court gave, but refused the third, fourth, fifth and seventh.

Defendants in due time, after the verdict of the jury was returned into court, which was for the plaintiffs, filed their motion in arrest of judgment, and therein assigned grounds as follows: *1st.* The petition does not state facts sufficient to constitute any

cause of action in plaintiffs against defendants, or to entitle plaintiffs to the relief prayed for in their petition or any other relief whatever. *2nd.* The court erred in admitting improper, illegal, incompetent and irrelevant evidence on the part of the plaintiffs against the objections of defendants. *3rd.* The court erred in rejecting and excluding proper, legal, competent and relevant evidence offered by defendants, on the objections of plaintiffs. *4th,* The court erred in giving the instructions numbered one, two, three, four, five and six, asked by plaintiffs and given in their instance by the court. *5th.* The court erred in refusing to give the instructions numbered three, four, five and seven asked by the defendants. *6th.* The finding of the jury on said issues is against the instructions of the court and contrary to law. *7th.* The finding of the jury on said issues is against the evidence and the weight of the evidence in this cause. *8th.* The finding of the jury is against the law and evidence.

The court below gave judgment and made decree as follows:

Now at this day came the parties aforesaid, and the jury by their verdict made and returned here into court found the first six of the issues submitted to them by the court affirmatively and for plaintiffs, and having also found the said seventh issue affirmatively, and it appearing also by the will of said testator, William Gilliss, that neither plaintiffs, Francis Boyer and James Charley, Jr., nor their mother, the said Nancy Gilliss, or any or

either of them were named or provided for in said will of said testator, William Gilliss.

It is therefore considered, adjudged and decreed that said testator, William Gilliss, so far as regards the said plaintiffs, Francis Boyer and James Charley, Jr., descendants of the said Nancy Gilliss, not provided for, and as to said plaintiffs, Francis Boyer and James Charley, Jr., is deemed in law to have died intestate, and as to said plaintiffs, the court doth declare said testator's intestacy.

And the court doth further consider, adjudge and decree, that said plaintiffs, as the children and descendants of the said Nancy Gilliss, are entitled to such proportion of the estate of said testator, William Gilliss, real and personal, as if he had died intestate. And the jury having found that said testator died leaving also as his children and heirs at law, the said Soplia Gilliss and Mary Gilliss, named and provided for in said testator's will, it is further considered, adjudged and deemed, that said plaintiffs, Francis Boyer and James Charley, Jr., as children and descendants of said Nancy Gilliss, deceased, and heirs at law of the said William Gilliss, are entitled and have right to one child's share, to-wit, the one equal undivided third part and interest in the estate of said testator, William Gilliss, real and personal, and that the same ought to be and shall be assigned to them by the defendant, and by the said Probate Court of Jackson County. And the court doth further consider and decree that said plaintiffs recover against the defendants their costs in this behalf expended to be levied of the share and interest in the estate of said Wm. Gil-

liss of the said Mary A. Troost under the will, in the hands of said Michael Dively, administrator *de nonis non* of the said estate unadministered, and of the estate and assets of said Mary A. Troost, deceased, in the hands of said Bernard Donnelly and Francis M. Black, executors of the last will of said Mary A. Troost unadministered, except so much of said costs as may have been occasioned by the said Sophia Gilliss and Mary Gilliss Rogers, which shall be taxed against them, and for which judgment is given against them.

The first question raised in this case, is as to the form of the action. It is insisted that the proceeding is premature, and that no specific relief is asked. No property, real or personal, is specified, and no subject matter upon which a judgment could operate.

This question was raised in the case of *Levins* v. *Stephens*, 7 Mo. 91, under a statute which was substantially in the terms of the present act. The 47th section of our present law (Wagn. Stat., p. 1370) is a mere copy of the 33rd section of the Revised Code of 1835, and contains the same word "received," which gave occasion to the discussion and decision in that case, from which we have no disposition to depart.

The second objection taken here, is to the action of the court in submitting issues to a jury. The 13th section of art. 9 of our Practice Act (Wagn. Stat., 1041) provides that the court in cases of the character of this, may take the opinion of a jury upon any specific question of fact involved by an issue made up therein for that purpose. Although this court

has determined that such verdicts are not binding on the court, yet no objection is perceived to the course adopted in this case.

The main questions, however, arise out of the instructions under which the case was submitted to the jury, and these instructions, it will readily appear, are intended to follow the law, as stated by the court, in the case of *Johnson* v. *Johnson,* 30 Mo. 72.

The facts in the present case, it is true, are materially different from the facts in the case of *Johnson* v. *Johnson,* but so far as the existence of a marriage is concerned, the evidence in this case was greatly stronger than in the other. There was no evidence of the marriage of Col. Johnson and the daughter of Keokuk, but cohabitation and the birth of three children. But if the testimony of Baptiste Peoria is to be credited (and of that the jury were to judge) there was not simply a cohabitation between Gilliss and Kahketoqua, but probably quite as formal a marriage as was customary among the Indians. A messenger or interpreter was sent by Gilliss to the parents, who lived some sixty or seventy miles south of the trading post on James Fork, to ascertain if Gilliss' proposals would be acceptable to the father and mother, and upon a favorable response, Gilliss immediately started with his messenger or agent down to Cowskin, with pack mules, carrying presents of blankets, beads, shawls, etc., to the father and mother of the proposed bride. He immediately returned with Kahketoqua, and her mother and brothers accompanied her to the trading station, thereby indicating an approval by all the family of the arrangement.

This was, undoubtedly, strong evidence of an Indian marriage, in which all the witnesses agree no ceremony was required, religious or otherwise, and in which the main feature is the consent of the parents of the proposed wife, and their acceptance of the presents offered.

But it is insisted that this marriage was of no validity, by the laws of Missouri, and that in 1829 or 1830, the Piankeshaw Indians were citizens of this State and subject to our laws. It seems from the testimony, that the Piankeshaws and Weas and Delawares and Shawnees were removed from Missouri, anterior to the alleged marriage; but that Laharsh, who was a Piankeshaw Chief, remained in the neighborhood of Cowskin Creek, perhaps for the purpose of hunting.

The Constitution of the United States, and the statutes passed in pursuance thereof, undoubtedly recognized the Indian tribes as a peculiar people, having relations to the government totally different from citizens of the States. Although located within the State lines, yet so long as their tribal customs are adhered to, and the Federal Government manages their affairs by agents, they are not regarded as subject to the State laws, so far, at least, as marriage, inheritance, etc., are concerned. The cases of *Morgan* v. *McGhee*, (5 Humph. 13), and *Will* v. *Williamson*, (11 Ala. 826), establish this proposition. Indeed, the Constitution of the United States especially authorizes Congress to regulate commerce with Indian tribes, as it does with foreign nations. The customs and laws of the Indians, then, prevailed among the remnants

of tribes located here in 1829 and 1830, and would continue unless positively changed by the legislature of the State. No such legislation was attempted, and it is useless to inquire if it had been, whether it would have been valid.

The first instruction is particularly objected to. That instruction directed the jury, if Gilliss, Kahketoqua and Nancy are all dead, to give every reasonable presumption in favor of the legitimacy of Nancy, not necessarily excluded by the evidence. This doctrine is asserted by the court in *Johnson* v. *Johnson,* and supported by the authorities there cited. The jury had a right to be instructed on this point. The legitimacy of Nancy is a material point in this case, and as she was dead, and her mother and reputed father, it was necessary to tell the jury what the presumption of the law was.

It is useless to examine the instructions in detail. They are manifestly a mere repetition of positions which the court adopted in *Johnson* v. *Johnson,* and the only question is, whether we will review and overturn the principles of that case.

We have no disposition to do so, and therefore affirm the judgment; the other judges concur.

The case of *Kobogum* v. *Jackson Iron Co.,* 76 Mich. 498, 43 N. W. 602, is another case in point, and in which many of the decisions I have herein incorporated in full are cited as authority; and in addition to them, the distinguished jurist—one of the ablest that ever graced any bench or

bar. enters into a disquisition of Indian marriages according to the usages and customs of the various Indian tribes, and hold valid the marriage in that case and the legitimacy of the children even though the father in that case had several wives, and the child involved in the case was by a second wife, by whom she was born while the first wife was then living, and with whom the father lived as well as with the second wife, the mother of this child. There Judge CAMPBELL, in delivering the opinion referred to upheld polygamous marriages among the Indians where their customs permitted it. This was also true in the case of *Ortley* v. *Ross,* heretofore cited from Nebraska. This Michigan case is as follows:

Case of *Kobogum et al.* v. *Jackson Iron Co.,*
76 Mich. 498, 43 N. W. 602.

SYLLABUS.

1. The rights of a holder of a certificate entitled him to a paid-up interest in a corporation, which has been recognized on its records, which is non-assessable, and which has never been surrendered, cannot be barred by laches until they are repudiated by the corporation, as the latter is a trustee for the certificate holder.

2. Marriage between members of Indian tribes in tribal relations, valid by the Indian laws, and contracted at a time when there was no law of the United States on the subject of Indian marriages, must be recognized

by the state courts, as Indians in tribal relations are not subject to state laws.

CAMPBELL, J.:

This litgation is substantially the same that was once before this court in the name of Jeremy Compo as complainant. 49 Mich. 44, 12 N. W. Rep. 901; 50 Mich. 580, 16 N. W. Rep. 295. Mr. Compo, having held the title of Charlotte Kobogum for her benefit, has reconveyed it to her, and the other complainants come in under the suggestion of this court that they were necessary parties, and all now sue jointly. Except as to their title, there is no important change in the facts. The circuit court for the county of Marquette gave a decree in favor of complainants, and defendant appeals. As the facts have been referred to sufficiently in the former case to make the nature of the controversy understood, it will not be necessary now to do more than give an outline of them.

In 1845, an unincorporated association was formed at Jackson, in this state, with the purpose of mining on Lake Superior, the country not having then been surveyed. The Indian title had been ceded by treaty promulgated in March, 1843, and the Indians were thereby allowed to remain in occupancy of the mineral lands until otherwise ordered by the president. Upon other lands they were also to remain until removed; and some subsequent treaty provisions, not here important, were adopted for their benefit. The treaty of Fond du Lac, of 1826, (Indian Treaties, 290,) had authorized the government to search for and take out minerals, with an express

saving that it should not effect title or jurisdiction. By some regulation which was probably military or executive, the supervision of these lands had, sometime after 1843, been placed in the war department, and at this time mining permits were issued by that department, on which renewable leases were given until legislation should be passed on the subject. By act of Congress of March 1, 1847, the persons holding permits or leases were authorized, as soon as the lands should be surveyed, to purchase their locations at $2.50 per acre, the minimum price to all others being $5; and the lands, leased or not leased, were transferred from the war to the treasury department. 9 U. S. St. 146. This same act, for the first time, provided for the creation of a new land district, and a geological survey and designation of the mineral lands, before the public lands should be brought into the market, contemplating considerable delay in the completion of land titles. The Jackson Company sent up persons to explore and secure mining lands. These gentlemen heard there was a valuable iron deposit, of which the Lewis Nolin, a half-breed, knew something. Not being able to find it, they were recommended to go to L'Anse, and find an Indian Chief named in the record Marji Gesick, in whose territory the land lay, and who could take them directly to it. Without making any definite bargain about his pay, they told him he would be rewarded; and he went with them, and took them to a remarkable and valuable iron bluff or mountain, since known as the "Jackson Mine," near Teal lake. This was imme-

diately located in the name of James Ganson, under a permit held in his name for the company; and his selection, dated October 4, 1845, was approved by the mineral land superintendent, Col. John Stockton, on the 5th of December in the same year, and a lease granted. In process of time, the mineral lands were surveyed; and on September 21, 1850, while the law of 1847 remained unchanged, the land was paid for, and patent issued to the incorporated Jackson Iron Company, claiming under the Ganson lease, which was the only method of entry then allowable on those terms.

After the land had been secured under the permit and location, the president and secretary of the association, Abram V. Berry and Frederick W. Kirkland, acting, as Mr. Berry says, under direct authority of the association, gave to Marji Gesick this document: "River du Mort, Lake Superior, May 30, 1846. This may certify that in consideration of the services rendered by Marji Gesick, a Chippewa Indian, in hunting ores of location No. 503 of the Jackson Mining Company, that he is entitled to twelve undivided thirty-one one-hundredths parts of the interest of said mining company in said location No. 503. (Signed) A. V. Berry, Pres. J. W. Kirtland, Secy."

It is testified that there was a further understanding that his son, a brother of complainant Charlotte, should be educated, but his death by drowning prevented. He was also allowed a suit of clothes and some other trifling articles. This paper was retained by Marji Gesick, and was found some time after his death in a

box containing some of his possessions by his daughter Charlotte Kobogum. Neither he nor any of his family or relatives could read or write. Francis Nolin, a Cree half-breed, who had married a Chippewa woman related to Charlotte, testifies that they were talking about the iron location, and Kobogum showed this paper, which they thought related to it, and for the purpose of finding out, showed it to Mr. Everett, one of the original parties who had dealt with Marji Gesick, and Mr. Everett made an endeavor to get matters righted in her behalf. In 1848, the Jackson Iron Company or Mining Company became incorporated by special act of the legislature, under the name of the Jackson Mining Company, for 30 years from April 3, 1848. Laws 1848, p. 337. At one of the early meetings of the new corporation, inquiry was made concerning the reservation of 18 shares of unassessable stock for the Indians, and the meeting was informed of the certificate given to Marji Gesick by Berry and Kirtland, and to other Indians not named. A resolution was then unanimously adopted reciting the issue of 18 shares of unassessable stock to the Indians, and directing a committee to report some provision for issuing stock certificates to them or their assigns. No further steps were ever taken, and nothing was ever said to Marji Gesick about it. In August, 1877, in contemplation of the approach of the end of the charter of the corporation, resolutions were adopted for the transfer of the assets to a new organization, and that all debts, demands, and liabilities existing against the old corporation should continue against the new

one. Defendant is that successor. It appears that at that time the officers, and all but one of the directors, resided in other states; and that as early as 1864, and apparently earlier, the books and business arrangements were all in New York City, where the president and other officers were located. Marji Gesick died near Marquette at a time not ascertainable by reason of the inability of the Indians to fix it definitely by our methods. It was apparently in 1857, or thereabouts. He left children by two wives. Charlotte Kobogum was his daughter by a wife of full blood, to whom the American name of Susan is given in the record. The other complainants are son and grandson of another daughter of a wife named Odonebequa. All of these persons were Indians belonging to the Chippewas, and in the Indian tribal relations, and the marriages were before the cessation of any of the Lake Superior lands by treaty. The testimony shows that the wives were considered lawful wives, and the children lawful children, by the Indian usages, and so recognized by Marji Gesick. The document given to Marji Gesick gave him an equitable title to the share therein mentioned of the location described. It appears to have corresponded in its subdivision to 12 shares in the enterprise, and as it is absolute, would have represented full-paid shares, and therefore unassessable, and was so regarded by the corporation when organized. It is equally manifest that until changed into share certificates, which might be done by mutual agreement, it must stand as an undivided interest in that location, and in nothing else but that, and whatever may have been ob-

tained as a result of working the mine. When this controversy arose, it included a large amount of accrued profits. These complainants, if heirs of Marji Gesick, would have a right to their share in the property and its results, unless barred by some rule of law. The only questions of any account are whether they are heirs, and, if so, whether they have lost their rights. The court below decided in their favor, and gave them relief, and unless there was error in so doing the decree must be sustained. The first question to be considered is whether they have lost their rights. It is claimed the rights have been lost by laches. There is no statute of limitations in the way; and the question is whether the rules of equity, by analogy or otherwise, have barred the right to have relief. The present defendant, when organized, stepped into the shoes of the former company, and became bound by the trust relation, if one then existed. That one existed when the first corporation obtained title is very clear, and, if now extinguished, the inquiry must be when and how the the trustee became authorized to disregard the beneficiary. As already noticed, Marji Gesick was recognized by name on the records of the corporation as holder of a certificate entitling him to a paid-up interest in the company, and a committee was appointed to provide for giving him new evidences of it. The recognition was unconditional and absolute. The records do not show that any further action was ever taken. The continued possession of the certificate shows that it was never surrendered. It does not appear that Marji Gesick was ever notified to change his

papers. He could not, on such an interest, be required to pay any assessments. Nothing further was needed on his part to inform the corporation of his rights, and there were no steps necessary, at law, or in equity, so long as his rights appearing of record were not repudiated. If dividends were earned, and proper notice given of them, the lapse of time might act on their recovery. But it is difficult to see what other effect could be created or could follow. The corporation held all its property in trust for the parties interested; and whether treated as equitable tenants in common, or as stockholders, could make no particular difference. There is no law which terminates the interest of a stockholder without some adverse action asserting its extinction or denying its existence, or which compels him to seek aid from courts when no such adverse position is taken. The first time when any pretense was set up against this interest must have been, if at all, when, in 1866, Mr. Everett called the attention of Mr. Stewart, the president of the company, to the paper given to Marji Gesick. We are disposed to believe the claim that Mr. Stewart proposed or promised to lay it before the directors. Whether he so promised or not it was his legal duty to do so, and he had no official authority to subject the corporation to the consequences of a refusal. His attempt to get rid of the claim by a small sum of money would no doubt have inured to the benefit of the company, had it succeeded. But he admits he expected the paper to be given up for any sum which he gave, and which was accepted. This would have been a compromise, and not

a gift. It appears affirmatively that he said nothing to the corporation or its directors about this claim; and it also appears that he saw, or should have seen, the record of its recognition. Whether he represented the company or not, there was then, at least, no corporate repudiation. The next claim was made in 1871 by Mr. Mapes, and led to no more definite results. It cannot be said that there was ever any repudiation of the claim till 1877, when, in the new organization, it was ignored. Since that time it cannot be urged that there has been any such laches as ought to interfere with equitable relief. Charlotte Kobogum's rights were put in litigation almost immediately, and the case reached this court by appeal on demurrer, and was argued in June, 1882. The other complainants were both infants in 1877, if the girl was then born. There has never been any acquiescence in the denial of their rights; and, unless some inflexible rule of law requires it, the courts should not go out of their way to cut off ignorant people like these, who are outside of the ordinary laws and habits of the whites. It was held in the case on demurrer, by a majority of the court, that there was no such legal difficulty; and, inasmuch as it has been held several times by us that equity will deal with each case on its own facts, there should be no unreasonable distinction of equities.

The cases of *Ingersoll* v. *Horton*, 7 Mich. 405, and *Abbott* v. *Godfrey*, 1 Mich. 182, go so far beyond the delays in this case as to render discussion needless. It must be remembered, further, that this is a case where a trustee, with notice on its own records of

Marji Gesick's rights, is seeking to get rid of his rights. While we do not find it necessary to hold that no lapse of time will exonerate a trustee, it is not equitable to favor such discharges of responsibility beyond the merits, where there has been no actual fault in the delay. In view of the corporate recognition, we can give no weight to the fact that, after they had got the benefit of Marji Gesick's services, some, and perhaps several, parties were displeased with the arrangements to pay him. If they were, they ought to have been ashamed of it. If he had been a white man, no one would have regarded him as entitled only to such a small share in the discovery due to his information, and which no white guide ever would have accepted. The uselessness of the ordinary compass enhanced the difficulties of exploring. It is undoubtedly true, that Indians may be easily led to make bad bargains, and, when made, usually stick to them. But this bargain was actually made, and it cannot be held that, because Marji Gesick might perhaps have been induced to give it up as of no great supposed value to him, he and his heirs ought to be deprived of it altogether. It is certain that he held on to it, and that there was an idea in the family that they had some interest in the iron mine. He was never asked to give it up, and he never gave it up. The only question remaining is whether Marji Gesick's interests passed to his descendants recognized by the Indian laws and usages. If they did, there is no doubt of the rights of these complainants. Upon this question enough was said in the opinion in 50 Mich. 580, 16 N. W. Rep. 295, to

render full discussion unprofitable. The United States Supreme Court and the state courts have recognized as law that no state laws have any force over Indians in their tribal relations. *Kansas Indians,* 5 Wall, 737; *New York Indians,* Id. 761; *U. S.* v. *Kagama,* 118 U. S. 375, 6 Sup. Ct. Rep. 1109; *U. S.* v. *Holliday,* 3 Wall. 407; *Dole* v. *Irish,* 2 Barb. 639; *U. S.* v. *Shanks,* 15 Minn. 369, (Gil. 302); *Hastings* v. *Farmer,* 4. N. Y. 293; *Cherokee Nation* v. *Georgia,* 5 Pet. 1; *Worchester* v. *Georgia,* 6 Pet. 515; *Wall* v. *Williamson,* 8 Ala. 48; *Wall* v. *Williams,* 11 Ala. 826; *Morgan* v. *McGhee,* 5 Hump. 13; *Johnson* v. *Johnson,* 30 Mo. 72; *Boyer* v. *Dively,* 58 Mo. 510; *Tuten* v. *Byrd,* 1 Swan, 108; *Jones* v. *Laney,* 2 Tex. 342. There was not, during any of the period involved in these inheritances, any law or treaty of the United States on the subject of Indian marriages, or in any way interfering with Indian usages on the subject. The testimony now in this case shows what, as matter of history, we are probably bound to know judicially, that among these Indians polygamous marriages have always been recognized as valid, and have never been confounded with such promiscuous or informal temporary intercourse as is not reckoned as marriage. While most civilized nations in our day very wisely discard polygamy, and it is not probably lawful anywhere among English speaking nations, yet it is a recognized and valid institution among many nations, and in no way universally unlawful. We must either hold that there can be no valid Indian marriage, or we must hold that all marriages are valid which by Indian usage are so re-

garded. There is no middle ground which can be taken, so long as our own laws are not binding on the tribes. They did not occupy their territory by our grace and permission, but by a right beyond our control. They were placed by the constitution of the United States beyond our jurisdiction, and we had no more right to control their domestic usages than those of Turkey or India. The treaties made between the United States and this very tribe, which are quite numerous, all recognize heritable relations among them, and in many instances, familiar to all old residents of the country, provided for the Indian families of persons who had other families; recognizing the Indian nation as entitled to say who should share in tribal benefits. As white men cannot withdraw themselves from state law, we should have no great difficulty in determining their personal status; but Indians who were members of their tribes were not obliged or authorized to look to state laws in governing their own affairs. The decisions in Alabama, Tennessee, Missouri, and Texas, above cited, all sustain the right of Indians to regulate their own marriages, and there is no respectable body of authority against it; on the contrary, it is a principle of universal law that marriages valid by the law governing both parties when made must be treated as valid everywhere. Even the English courts, which assert some extra territorial power over Englishmen which is contrary to our American rules, have never doubted this doctrine. They have held for peculiar reasons that their ecclesiastical law did not usually operate on any marriages not governed by English law;

but at the same time it has been held that, except for these peculiar reasons and these peculiar cases, marriages under other laws must be recognized as governed by the law of the place. There is no doubt that any rule which holds that a man is lawfully married to one wife at one place, and to another at another place, is more in favor of polygamy than against it; and this is the direct result of some of the European decisions, like that upon the Jerome Bonaparte marriage, as well as some English decisions. It is entirely intelligible that a system of procedure, operating directly on married parties, to compel them to obesrve their mutual relations, is not consistent with plural or dissoluble marriages, and it has been so held. In *Ardaseer Cursetjee* v. *Perozeboye,* 6 Moore, Ind. App. 348, it was held that Indian marriages did not come within the jurisdiction of the ecclesiastical courts; but it was admitted they were valid, and that the courts created in India to administer Indian laws would recognize and enforce all rights arising under them. In the notes it appears that this case seems to have involved a great deal of litigation, and there is no doubt that the particular questions passed on by the privy council were correctly decided. So, in *Lindo* v. *Belisario,* 1 Hagg. Const. 216, and *Goldsmid* v. *Bromer,* Id. 324, and *Ruding* v. *Smith,* 2 Hagg. Const. 371, the distinction between the validity of marriages, and the applicability of certain remedies to them, is well defined. And see Guthier's edition of Savigny's Private International Law, 18-20, for further explanations concerning the laws of separate tribes. We have here marriages

had between members of an Indian tribe in tribal relations, and unquestionably good by the Indian rules. The parties were not subject in those relations to the laws of Michigan, and there was no other law interfering with the full jurisdiction of the tribe over personal relations. We cannot interfere with the validity of such marriages without subjecting them to rules of law which never bound them. We think the complainants are the lawful holders of Marji Gesick's interest, and that the decree should be affirmed.

The other justices concurred.

Kindred to the subject in hand is the case of *In re Heirs of House,* 132 Wis. 212, involving a marriage according to the customs of the Oneida Indians. The Supreme Court of Wisconsin in that case held:

Case of *In re Heirs of House,*
132 Wis. 212.

SYLLABUS.

1. Under the act of Congress, approved February 8, 1887 (24 U. S. Stats. at Large, 388, ch. 119), an Indian allottee of lands who died within the twenty-five years during which title was to be held by the United States in trust for him had no power to devise his interest in such lands to any person.

2. Under the amendatory act of February 28, 1891 (26 U. S. Stats. at Large, 794, ch. 383), all children of an Indian allottee of lands who dies within the twenty-five year

period mentioned, whether such children are legitimate or illegitimate, are made his heirs for the purpose of inheriting such lands, and the children of a deceased illegitimate child are entitled to the share of their deceased parent.

STATEMENT OF FACTS.

Thomas House, Sr., an Oneida Indian, died on the Oneida reservation, in Brown county, November 3, 1894. At the time of his death he held a patent to certain lands which were part of the reservation which had been allotted among the Oneidas. The patent provided as follows: "That the United States of America, in consideration of the premises and in accordance with the provisions of the fifth section of the act of Congress of the 8th of February, 1887 (24 U. S. Stats. at Large, 388, ch. 119, which provided for the allotment) hereby declares that it does and will hold the land land thus allotted (subject to all the restrictions and conditions contained in said fifth section) for the period of twenty-five years, in trust for the sole use and benefit of the said Thomas House, or, in case of his decease, for the sole use of his heirs, according to the laws of the state or territory where such land is located, and that at the expiration of said period the United States will convey the same by patent to said Indian, or his heirs, as aforesaid, in fee, discharged of said trust and free of all charge or incumbrance whatsoever; Provided, that the President of the United States may, in his discretion, extend the said period."

In 1837, House married according to white

man's law one Lydia Archiquette, with whom he lived for about one year. There was no issue as the result of this marriage, and at the end of about a year they voluntarily separated, and Lydia Archiquette thereafter cohabited for a period of about fifty years with another Indian with whom she raised a large family of children. Lydia Archiquette died before House, but during her life, House cohabited with and had children with eight other Indian women. All of these children except two were living at the time of his death. One of these two children left surviving her, Thomas House Ninham, and the other left surviving her Simon House and William House. Thomas House Ninan is the legitimate child of his mother. Before the dissolution of the tribal relation by the Oneidas, the deceased adopted Thomas Howe Ninham in accordance with a well-defined custom or law of adoption among the Oneidas. As such son by adoption, he was entitled under the laws and customs of the Oneida Indian tribe to the same rights and privileges as a natural born son. The laws, customs, and rules of the Oneidas and the procedure for their enforcement rested entirely in parol. Permanent marriage of one man to one woman was fully recognized among them and generally observed. There was no law of descent of real property among them.

By a will which has been lost, House attempted to devise the lands involved in this action to one of his children. He referred to him in such will as "my son, Aaron House." By another will, attempting to dispose of these lands, he referred to Thomas House Ninham

as his grandson. House left a number of brothers and sisters surviving him. This proceeding is instituted under ch. 166a, Stats. (1898), for the purpose of determining who are the heirs of Thomas House, Sr. The above facts are taken from the stipulation made by the interested parties before the county court, and on appeal were stipulated before the circuit court as the facts of the case.

As the conclusions of law, the circuit court found that Aaron House, an illegitimate son of Thomas House, had been legitimated by the will, wherein he was referred to as "my son, Aaron House;" that Thomas House, Jr., was entitled to inherit according to the customs and laws of the Oneida Indians the same as any lawful issue of Thomas House, Sr.; that Thomas House, Sr., had no legal capacity to make a will disposing of the real estate in question; that all of the illegitimate children of Thomas House, Sr., were entitled, under the federal statutes, to inherit and share in the real estate of their father, the same as though they were legitimate children; and that the children of a deceased illegitimate child were entitled to the share of their deceased parent. From judgment establishing who were the heirs of Thomas House, Sr., which was entered in accordance with the conclusions of law of the circuit court, Thomas House Ninham and Aaron House separately appeal.

SIEBECKER, J.:

This is a proceeding under Sec. 3873b, Stats. (1898), to determine who are the heirs of Thomas House, deceased. The judgment appealed from declares that all children named

are his heirs for the purpose of taking an interest in the lands allotted to him under an act of Congress approved February 8, 1887, (24 U. S. Stats. at Large, 388, ch. 119), as amended by an act of February 28, 1891, (26 U. S. Stats. at Large, 794, ch. 383). This statute provides for the allotment of lands to Indians and Sec. 5 provides that patents shall issue to allottees. It declares "that the United States does and will hold the land thus allotted, for the period of twenty-five years, in trust for the sole use and benefit of the Indian to whom such allotment shall have been made, or, in case of his decease, to his heirs, according to the laws of the state or territory where such land is located," and that a conveyance in fee by patent will be made to the allottees at the expiration of such period, discharged of the trust and free from all charges and incumbrances, and provides that any conveyance of such lands or contracts touching the same shall be absolutely null and void; and further provides "that the law of descent and partition in force in the state or territory where such lands are situate shall apply thereto after patents have been executed and delivered." The amendatory act of February 28, 1891, added the following: "Sec. 5. That for the purpose of determining the descent of land to the heirs of any deceased Indian under the provisions of the fifth section of said act, whenever any male and female Indian shall have cohabited together as husband and wife according to the custom and manner of Indian life, the issue of such cohabitation shall be, for the purpose aforesaid, taken and deemed to be the legitimate issue of the In-

dians so living together, and every Indian child, otherwise illegitimate, shall for such purpose be taken and deemed to be the legitimate issue of the father of such child."

It is contended in behalf of the appellant, Thomas House Ninham, that the deceased had the right under this act to devise his interest in the lands allotted to him, and that appellant is entitled to them under decedent's will. The power of decedents as allottees to dispose of their interests in these lands is expressly prohibited in the fifth section of the allotment act. It is argued from the provisions of Sec. 6 of the Act of 1887, providing that when lands are patented to allottees, they "shall have the benefit of and be subject to the laws, both civil and criminal, of the state or territory in which they may reside," it follows that the laws of Wisconsin establish and control the ownership and interest of the allottees in respect to such lands. This position has been urged in like cases heretofore, and held untenable under the United States dual system of government. In matter of *Heff*, 197 U. S. 488, 25 Sup. Ct. 506, in an application to the Supreme Court of the United States for a writ of habeas corpus, it was held that, in construing statutes regulating the relationship of the government and the Indians, their subjection to the full control of the United States as its wards must be recognized, and the judgment of Congress in this field, as expressed in its legislation, must control. In speaking of the provision in this act prohibiting alienation or incumbrance of these lands, and the stipulation "that the grant of citizenship shall not deprive the Indian of his interest in tribal or

other property," it is declared: "These are mere property rights, and do not affect the civil and political status of the allottees. In *U. S.* v. *Rickert*, 188 U. S. 432, 23 Sup. Ct. 478, we sustained the right of the government to protect lands thus allotted and patented from any incumbrance of state taxation. Undoubtedly an allottee can enforce his right to any interest in the tribal or other property (for that right is expressly granted), and equally clear is it that Congress may enforce and protect any condition which it attaches to any of its grants. This it may do by appropriate proceedings in either a national or a state court. But the fact that property is held subject to a condition against alienation, does not affect the civil or political status of the holder of the title."

Within the doctrine of this decision, the contention that this property of House is not subject to regulation or control except by the law of this state, cannot be maintained, and the condition of the grant imposed by Congress, prohibiting alienation, is effective and controlling. In the case of *U. S. ex rel. Zane* v. *Zane*, 4 Ind. Ter. 185, 69 S. W. 842, in the court of appeals of Indian Territory, it was expressly held that an allottee under this act who died within the twenty-five year period, had no power to alienate or devise the lands so allotted to him or any interest therein. We deem the principle of these adjudications applicable and conclusive on the question that the deceased held the lands allotted to him subject to the condition imposed by Congress. Under this condition, he had no power to devise his interest therein to any person.

It is said that the trial court erred in construing that part of these statutes which was enacted for the purpose of determining the descent of these lands to the heirs of any deceased Indian. It was manifestly intended that the word "heir," as used in this part of the act, should include the children of Indians coming within the classes specified, namely, first, the children born to "any male and female Indian (who) shall have cohabited together as husband and wife according to the custom and manner of Indian life." This class of children are to be "taken and deemed to be the legitimate issue of the Indians so living together." The intent of this provision for the purposes of this act was evidently to make this class of children, who are legitimate under Indian custom and manner, legitimate within the state or territory where they reside, though the laws of such state or territory might not recognize them as legitimate, because their parents were not married according to the laws of such state or territory. The other class is comprehended in the phrase immediately following the part last above quoted. It reads: "And every Indian child, otherwise illegitimate, shall for such purpose be taken and deemed to be the legitimate issue of the father of such child."

It is urged that the trial court's construction, that they formed a class different from the first, which included all the illegitimate children of the father who were not the issue of him and a female cohabiting together as husband and wife according to the custom and manner of Indian life, rendered the previous class an unnecessary one, because this

latter class would include all illegitimate children. It is evident that this class of children is constituted of those who are illegitimate according to Indian custom and manner, as well as by the law of the state or territory where they reside, and as such might accordingly not occupy the same status as to the right of inheritance that the first class do, whose legitimacy recognized according to Indian custom and manner is imported into the state or territory where they reside and given effect for the purpose of this act. Recognition of this difference in their status by Indian custom and manner and the law of the state or territory, makes the act inclusive of all Indian children not born in lawful wedlock according to the law of the state or territory of their residence. It seems that Congress, in the evident purpose of caring for all Indians as its wards, whether legitimate or illegitimate, framed this statute so as to include all Indian children legitimate or illegitimate under the codes of the Indians or of the state or territory where they reside. There is no question under this interpretation of the statute but that all of the children of Thomas House, deceased, are his heirs for the purpose of inheriting the lands allotted to him under the act of Congress. This disposes of the question as to who were his heirs for this purpose, and results in Thomas House Ninham taking the share of his mother, who was one of the children of Thomas House, deceased.

So far as the purposes of this litigation are concerned, the question of what constitutes an adoption by the Oneidas, and its effect when such adoptive parents and the children

become citizens of Wisconsin, as well as the question of whether Aaron House was legitimate by being recognized as a son in his father's will, are not involved in determining who are the heirs of Thomas House for the purposes of this case. These questions were elaborately presented and discussed by counsel, and will be of grave importance whenever rights to property depend on them. We deem it advisable, however, not to consider and discuss them until they are presented in such a case.

By the Court—Judgment affirmed.

In *Turley* v. *Paog's Admr.*, 2 Tex. Rep. 139, it was held that, "It is competent for the jury to determine the fact of marriage from evidence of cohabitation, common repute, acknowledgment of parties and other circumstances from which the inference may be determined." Why does not this case apply directly to the case at bar? We have the "cohabitation;" "common repute" as shown by Mary Grayson, Robert Thomas, Roley Alexander and others; the "acknowledgment" of Ben, his mother and the mother of the child, all declaring Nellie was Ben's child; nay, even more than this—we have the finding of the trial court that she was their child, and we have "other circumstances" in the form of the positive and undisputed testimony of Jennie McGilbra herself, that Ben asked her to marry him, she accepted and they went home together that day and slept together

that night and lived together as man and wife for one and one-half years thereafter at the home of his mother. What else was needed according to these decisions? It would be hard to say, unless it was a license duly written out, signed by witnesses, the minister and the record of some court, which the Indians did not have, and, perhaps, never heard of such things. No such testimony as that is ever required in proving marriages among Indians under tribal relations.

In *La Rivier et al.* v. *La Rivier et al.*, 97 Mo. 80, 10 S. W. 840, it was also held that, "It is not necessary to the validity of a marriage according to the customs of the Pence Indians that it be actually contracted on the territory set off to or occupied by them." See also the case of *People ex rel. LaPorte* v. *Rubin*, 98 N. Y., Sup. 787, which was a habeas corpus proceeding for the possession of a child wherein the marriage came up, and it was shown that the marriage could be consummated among the Onondago Indians by simply going together and living together under their customs, the same as the proof shows could be done among the Creeks; and the court recognized its validity and the legitimacy of the child in that case. In *Pourier et al.* v. *McKinzie et al.*, (June 11th, 1906), 147 Fed. 287, it was held: "A marriage between a white man and an Indian woman prior to 1868 was sufficiently established by proof of co-

habitation, admissions and reputation, together with the presumption arising therefrom in favor of the legitimacy of a child of the parties, under Civ. Code Mont., Sec. 280, 282, and the parents being dead."

Let me also refer the court to the case of *Kalyton* v. *Kalyton*, 74 Pac. 491, which involved the validity of an Indian marriage under the usages and customs of the Cayuse tribe on the Umatilla Indian Reservation in the State of Oregon. Here, Joe Kalyton, a Cayuse Indian, about April 21st, 1891, was allotted 157 acres in said reservation, and thereafter lived and cohabited with plaintiff's mother, and died about January, 1899, leaving the plaintiff, Agnes Kalyton, and a sister, Mary Kalyton. The said plaintiff was the daughter or offspring of said union between said Joe Kalyton and his wife, or the Indian woman with whom he was so living. The sister, Mary Kalyton, claimed said lands as the sole and only heir of Joe Kalyton, deceased, and set up that said Agnes Kalyton was an illegitimate child, and that her brother, Joe, and plaintiff's mother had never been legally married, and sought to support this theory upon the fact that plaintiff's mother had been previously married several times before she and Joe lived together, the same as the defendants in error in the case at bar, are now supposed to try to uphold the decree in this case, be-

cause Ben Porter had previously married and lived with several other women in the Creek Nation. But the Supreme Court of Oregon held the marriage between Joe Kalyton and plaintiff's mother valid, and that Agnes Kalyton, the plaintiff, was their legitimate child and the sole and only heir of her father, Joe Kalyton, and decreed the lands to her accordingly. This case was appealed to the Supreme Court of the United States, and may be found in 51 Law Ed. page 566. It was by that court reversed, but not upon the "principles applied by the court (below) in disposing of the merits of the case," but on the ground that the state court of Oregon had no jurisdiction to try or entertain the case, because of the Federal question involved in it.

In delivering the opinion of the Supreme Court of Oregon, in that case, Justice Moore observes:

> "It is maintained by defendant's counsel, however, that plaintiff's mother was not competent to enter into a marriage contract at the time, or after she commenced living with Kalyton, and, this being so, plaintiff's illegitimacy is established, and no error was committed in decreeing the real property of which he died seized to his sister, as his sole heir. The testimony shows that plaintiff's mother had lived with the following named Indians, as the wife of each, respectively, to-wit, Ish-lo-wal-ko, White Wolf and Top-la-won. The

transcript does not show whether or not the first named person is dead, but it discloses that the others were living during all the time she lived with Kalyton, Top-lo-won having remarried. The plaintiff's mother testified that she was married to those persons in the Indian manner, and that she ceased to live with and separated from each according to the customs of her tribe. The following question was propounded to the interpreter: 'Ask her if she separated or was divorced from White Wolf and these other Indians according to Indian customs, the same as Indians always separated?' and she answered, through him, as follows: 'Yes, sir; separated in the Indian way.' No evidence was offered tending to show how an Indian divorce is secured, and it is argued by defendant's counsel that the testimony of plaintiff's mother is the mere statement of a legal conclusion, and insufficient to establish the probative facts of the dissolution of the marital relation according to Indian custom. The legal principle insisted upon would ordinarily be sufficient to defeat the plaintiff's right of recovery, but in the present instance we do not think the rule invoked applicable, for, in settling the pleadings, the court having held that after the allotment of lands in severalty a marriage according to law was a prerequisite to the legitimacy of the issue of cohabitation, the subordinate question of the capacity of plaintiff's mother to enter into a marriage contract with Kalyton was not given that degree of attention which its importance demanded. No objection was interposed to the questions propounded to her in relation to her separation

from her prior husbands, nor was she cross-examined as to the customs of her tribe in the manner of securing divorces, in view of which we believe the testimony was sufficient to show that she was divorced from them, and was capable of entering into a valid marriage with Kalyton."

There is a case where the father and mother were married according to the Indian custom, the same as Ben Porter and Jennie McGilbra, and had one child, just as did Ben and Jennie. The evidence in that case was no stronger or more complete than in the case at bar, but was practically to the same effect, and the case was tried upon its merits, with all the evidence in against the legitimacy of the child and the validity of that marriage. And still, the court held the evidence sufficient to establish a legal marriage and proclaimed it valid and the child legitimate, and gave her the lands of her dead father, the same as should have been done in the case at bar. But the present case is greatly strengthened on comparison, from the fact that, in the case at bar, there was a demurrer to the evidence, in which case every inference, conclusion and presumption of both law and fact is given in favor of the plaintiff in error, Nellie Porter, and against the defendants in error, whereas in the Kalyton case each had an even break, with the burden upon the plaintiff therein, Alice Kalyton. There was another thing in that case which is not in the case at bar, namely, the

mother in that case had been married to, and had lived and cohabited with several other men before she married Joe Kalyton. In the case at bar, Jennie McGilbra was the first woman to whom Ben Porter was married, and he was her first husband. The evidence on this point was emphatic, unequivocal and positive, and no one disputed it. Why should not this case be decided the same way as the Kalyton case?

The case of *Jones* v. *Meehan*, 175 U. S. 1, was a controversy over a lease of lands, formerly belonging to Moose Dung, a Chippewa Indian, and situated on Red Lake river in Minnesota. Moose Dung was an Indian chief, and had a plurality of wives, and his tribe had laws of descent and distribution which were unwritten, but it would seem were rather in the nature of the old English primogenitureship, the lands falling to the oldest son of the first wife on the death of the father. Justice Brewer recognized those laws, and held in that case that Moose Dung, the oldest son, inherited the lands of his father under the usages and customs of that tribe. Here was not only a plurality of wives recognized by the Supreme Court of the United States, but it followed the usages and customs of that tribe to the exclusion of the laws of the State of Minnesota, within whose borders they lived and resided, and held:

"The right of inheritance in land of a

member of an Indian tribe whose tribal organization is still recognized by the government, is controlled by the laws, usages and customs of the tribe, and not by the laws of the State in which the land is situated, nor by any action of the Secretary of the Interior."

In that case there were two witnesses testified to these usages and customs, Morrison and young Moose Dung himself. In the case at bar, there is John A. Jacobs, Robert Thomas, John Goat, Barney Tiger and Johnson E. Tiger, the son of an Indian chief again. Goat and Johnson E. Tiger not only testified to the usages and customs of marriage among the Creek Indians, but likewise that the children of such marriages inherited the property of the deceased father, according to such customs. Here we have the evidence, undisputed, in this case, that such marriages as was described by Jennie Washington as having been consummated between herself and Ben, but likewise that the children of such marriages were legitimate, and inherited the property of the father. What more do we want and what more can we get? If it is suggested that at the time of the death of Ben Porter in November, 1906, the laws of Congress then spread over the Indian Territory, were in force, and not the Creek laws of descent, then we answer that Chapter 49 of Arkansas was then in force, and under them the child took the lands of the father, subject to the dower of the mother.

So Nellie Porter would get the lands in either event; and it is immaterial which system of laws is followed in this case.

The case of *Stikes, Admr.*, v. *Swanson,* 44 Ala. 633, was a case respecting the descent of property of Cassius Swanson, who was a slave and died in 1860, leaving considerable personal property and three sons and two wives.

> *Held: "1st,* the marriages of slaves and freedman of color with slave women during the existence of slavery in this state, were not illicit connections, but were legal *quasi* marriages such as the law allowed and the church approved. *2nd.* The children of such marriages were not bastards at common law, and there were no laws of the state that made them bastards. Upon the emancipation of such children of such marriages, by the result of the late war, and the elevation of those persons to citizenship of this state, their inheritable blood was restored, the impediment of slavery which obstructed it before, being thus removed. *3rd.* Such children are entitled to inherit the estate of their father who died a freedman, when his estate remained in the hands of his administrator up to the date of their emancipation."

Thus, it is seen that the children of a freedman and slave women were not ever stigmatized as bastards at common law, and entitled to inherit their deceased father's estate. For a strong opinion upholding even polygamous marriages among

Indians, see the dissenting opinion of Judge Campbell, of the Supreme Court of Michigan, in the case of *Compo* v. *Jackson Iron Co.*, 116 N. W. 297. On the subject of the presumption of marriage generally, the Supreme Court of Arkansas, in the noted case of *Kelly's Heirs et al.* v. *McGuire et al.*, 15 Ark. 604, observed:

> "The next question is, whether the descendants of Mary Eikelburner can inherit from Clinton and Greenberry Kelly. And this depends on the fact whether she was his legitimate daughter.
>
> Hearsay, or, as it is generally termed, reputation, is admissible in all questions of pedigree. And the phrase, 'pedigree,' embraces not only descent and relationship, but also the facts of birth, marriage and death, and the times when these events happened. The entry of a deceased parent, or other relative, made in the Bible, family missal, or any other book, or document, or paper, stating the fact and date of the birth, marriage, or death, of a child or relative, is regarded as the declaration of such parent or relative in a matter of pedigree. Correspondence of deceased members of the family, recitals in family deeds, descriptions in wills, and other solemn acts, are original evidence, where the oral declarations of the parties are admissible. Inscriptions on tombstones, and other funeral monuments, engravings on rings, inscriptions on family portraits, charts of pedigree, and the like, are also admissible as original evidence of the same facts. 1 Greenl. Ev. 103, 104, 105;

The Berkley Peerage Case, 4 Campb. 401, 418; *Jackson* v. *Cooley,* 8 John. 128, 131.

Probably the only exceptions to the rule arise in prosecutions for bigamy, and in the civil action for criminal conversation. In these cases, from the very nature of the issue, an actual marriage must be established, and reputation will not suffice. 7 John. 314; 4 Burr. 2057, 2059; Doug. 171; 1 A. K. Mash. 331; 3 Phil. Ev., note 782, page 1147. Declarations of members, relatives of the family, or general repute in the family, are good evidence to establish marriage, death, birth, heirship and the like, and may be proved by others as well as surviving members of the family.

It would serve no useful purpose to reproduce, in this opinion, the testimony on this point, but it will suffice to state its effect.

It is proved, by the repeated declarations of Greenberry Kelly, running back thirty or forty years, that he was married in Pennsylvania, and by that marriage had two children, Charles and Mary; that he separated from his wife in Chilicothe, Ohio, she remaining there and keeping the daughter, Mary, and he emigrated to Clark County, Kentucky, and taking with him his son, Charles. He always recognized these as his legitimate children; they recognized him as their father, and recognized each other as brother and sister. The marriage, and legitimacy of these children, were spoken of and known in the family, and no doubt was expressed as to the one or the other. In the community, they were received and regarded as the lawful children of Greenberry Kelly, by a lawful marriage.

Considering the great lapse of time, and

the fact that the parties were in the humbler walks of life, it would not be expected that any better evidence could be produced; and, indeed, it is matter of surprise that such an amount of it has been brought forward, sufficient at least to prove the marriage of Greenberry Kelly, and the legitimacy of Charles Kelly and Mary Eikelburner, as his children. On these points, we entertain no doubt."

In Sec. 93 of Rogers on Domestic Relations, the author says:

"There are many ways in which the contract of marriage may be proven. A frequent mode is to show the reputation as married persons of the parties whose marriage is in issue. The general rule in all civil cases is, where a man and woman live together as husband and wife, recognizing each other as such, and being so reputed among their friends, relatives and acquaintances; where they have children who are recognized as legitimate by themselves, and are generally reputed as legitimate; who have lived together and conducted themselves toward each other and the world at large as married persons, the law will infer a marriage regularly entered into. In all such cases the inference or presumption is, such conduct, holding out and reputation are inconsistent with anything short of a valid marriage; that parties are not living in adultery or illicit intercourse to their own disgrace and the violation of the law. It is a matter of common knowledge that when persons so live together and build up a reputation of marriage, they have been, at some time, actually

and legally married, unless it be in very rare cases. This being true, it is generally sufficient, in order to show valid marriage for all civil purposes, to show a state of fact,"

citing a long line of decisions from all over the Union.

Again, the same author, in Sec. 100, says:

"Where persons are shown to be married, it is not necessary to prove in what manner they were married. The law presumes validity whenever it is shown that the marriage has taken place, in the absence, of course, of different state of facts affirmatively proven. The same presumption is indulged where the parties have lived together as husband and wife for a long time, believing themselves to have been regularly married, and where they have earned such a reputation among their neighbors, relatives and acquaintances. And in such instances it requires strong, clear, convincing and satisfactory proof to overcome this fixed presumption of validity. The law is so ready and willing to indulge the presumption of a marriage, that all things necessary to a legal marriage will be presumed where the parties hold themselves out to the world as being married, and there is nothing to indicate the contrary. Where the marriage is once shown to have been consummated, proof of the reputation that the persons are not married is not competent. The contract being a fact, it is of little consequence what others think about it,"

again citing numerous decisions to sustain his text.

This text alone does not look like it was safe to stand on a demurrer to the evidence in this case. Here we proved the contract of marriage by the living party to it, coupled with the fact established by her own testimony and others, that they lived and cohabited together from one and one-half years to "about two years," at the home of Ben's mother, and of which cohabitation this child was born. All this while they were known by "their neighbors, relatives and acquaintances," as man and wife, and were recognized by them as such, but as to the invalidity of their marriage and the illegitimacy of their child, where is "the strong, clear, convincing and satisfactory proof" which is "required" "to overcome this fixed presumption of validity?" It is not in the records, and can't be *read* in there; nor can the court go on the presumption that it exists. They had their day in court, and saw proper to take their chances only on a demurrer to the evidence, without even attempting to prove the invalidity of that marriage. As this court said in *Locust* v. *Caruthers et al.*, heretofore cited, every presumption of the legality of the marriage, and the marriage itself, and the legitimacy of the children of such cohabitation, is in favor of marriage and the legitimacy of such children. I am proud to observe that that opinion of this court is substantiated and upheld by the numerous decisions and authority I have cited in this brief. The same author there says:

"Where the marriage is once shown to have been consummated, proof of the reputation that the persons are not married is not competent. The contract being a fact, it is of little consequence what others think about it." Here let me call attention to the testimony of John Lowe, who said he did not think Ben and Jennie were married. Lowe proved a traitor in the camp, it is true, but the importunities of the defendant, Wilson, made to Robert Thomas to get, "straight" on his testimony so they could get "together," and his solicitude toward Roley Alexander in giving him the two dollars when he found Roley was going to testify in the case, might have had something to do with this departure. But still, his assertion amounted to *nothing,* as he admitted he was in Texas along about that time and knew nothing about it himself; second, because this is a demurrer to the evidence, in which case all "conflicting evidence" must be disregarded; and the facts alleged in the petition where sustained even by "the slightest degree," (*Ziska* v. *Ziska*) must be taken as admitted against the party demurring.

Again, the same author in Sec. 105, says:

> "Where the existence of a marriage is alleged, it is always necessary for the person relying on the same to establish it by competent evidence. The party denying the marriage has no proof to make until the *prima facie* case is made out by his adversary. But in making the *prima facie* case, it is not neces-

sary to prove where nor when the contract was made; it is sufficient that it be shown that, at some time, it was actually entered into. And where the proof leaves the facts of marriage in doubt, the courts will always resolve the doubt in favor of the marriage. Especially is this true when the marriage has for many years been supposed to have lawfully existed or where an adjudication of nullity would bastardize children or have a like evil effect."

Elliott on Ev., Sec. 2490, observes:

"Marriage may be proved, in civil actions by either direct or circumstantial evidence. The conduct of the parties is competent evidence to prove a marriage, and so may be any proper circumstantial evidence tending to establish the fact. The fact of marriage is usually proved by the record of it and the identification of the parties. But it is not essential that the proof of the fact of marriage be by the record of the marriage or by other documentary evidence. It is held that such evidence is not necessarily the "best evidence." Even in those states where the statutes provide that the record of marriage shall be competent evidence of the marriage, it is not considered the only evidence nor the best evidence. That is, other evidence than the record is admissible. And so it has been held that the record is not conclusive proof in face of other evidence. So, also, declarations of parties since deceased and family reputation are held admissible in proof of the fact of marriage. The following facts have also been held admissible on the question of a mar-

riage: That a woman assumed and went by the name of defendant, and that the parties cohabited together, had children and christened them with the man's surname. And it has been held that where no better evidence is obtainable, hearsay and traditionary evidence are admissible for the purpose of proving marriage. Thus, whether the parents of a child born eighty-seven years ago were married, there being no living witness or documentary evidence, may be proved by hearsay. It has also been held that a marriage celebrated in one state may be proved by parol in another state in the absence of statutory requirements. The following persons have been held competent as witnesses to give their testimony as to the fact of marriage: Persons who saw the marriage ceremony performed; the person who performed the ceremony, and generally the contracting parties themselves. The clergyman or officer who performed the ceremony may testify as to his authority to perform the act. And oral testimony of witnesses testifying to such facts is sufficient without proving the election or appointment of such person as a clergyman or justice of the peace or one authorized to perform the ceremony. The fact of marriage may also be established by the admissions of the contracting parties without the necessity of producing other evidence. In such cases it is held that further proof, as proof of the record or certificate of marriage, is not essential."

To the same effect is Jones on Evidence, Sects. 86 and 87; and Wigmore on Evidence, Sects. 2505 and 2506, and the sections therein referred to

and decisions cited in support of the text of these voluminous writers. Here Wigmore, in Sec. 2505, says: "The conduct of a man and a woman as husband and wife, i. e., their 'habite' or cohabitation, together with their local repute as married, are not only admissible in evidence (*ante* Sects. 268, 1602, 2083), but also are regarded as sufficient to create a presumption that a marriage took place—whether by consent or ceremony, according as the local law requires," citing a long list of decisions of various states of the Union.

As to evidence of marriage, etc., see also Elliott, Secs. 2484, 2485; and as to presumptions in general, Sec. 2486; conflicting presumptions, Sec. 2487, where the author says: "In a case of conflicting presumptions, in civil cases, the presumption of marriage generally prevails over all others." If that is true as to the law generally, where each side contested the issue of marriage, would it not be doubly so where only one side presented the facts showing, or even tending to show, marriage and the other stood on his demurrer to such evidence thus adduced? Certainly so. Here the plaintiff in error is doubly fortified in her claim of right; for she is entitled to every presumption of the legality of the marriage of her father and mother under these rules of law and evidence I have cited, as well as the decisions of the various courts whose decisions are set out and referred to; and, second, she is also entitled to every ad-

vantage arising out of this demur to her evidence by which all *conflicting* evidence is eliminated and ignored, and all facts in her petition are taken as admitted where they are substantiated even "in the slightest degree," *Ziska* v. *Ziska,* 20 Ok. 634, and the other cases heretofore cited. Then where is the ground on which this decree can stand, holding that Nellie Porter is a bastard and the illegitimate child of Ben Porter and Jennie, his wife? It is nowhere apparent, and we do not think it exists.

To the same effect as the above authorities is Bishop on Marriage and Divorce, Sec. 437, etc., where the author says:

> "The result of these propositions is, that, as already stated, when a man and woman are living together in the way of a husband and wife, and there is no counter-evidence or counter-presumption in the case, they are taken in law to be married persons, * * * "

"Like all other contracts," remarks Bullard, J., in a Louisiana case, "marriage may be proven by any species of evidence, not prohibited by law, which does not pre-suppose a higher species of evidence within the power of the party; and cohabitation as man and wife furnishes presumptive evidence of a preceding marriage. It is not to be presumed those who hold themselves out in society as man and wife, who are rearing a family of children at their domestic board, to whom the fa-

ther gives his name, over whom he exercises a parent's authority, and administers protection and support, are living in open disregard of public morals, and that their common offspring are bastards," citing *Holmes* v. *Holmes*, 6 La. 463. See also Sects. 438 and 439, relative to the same subject matter.

In 26 Cyc, page 872, the author says: "In the absence of such legislation (requiring marriage under a statutory method) a marriage may be proven by circumstantial evidence; and since the presumption is in favor of marriage and against concubinage, the fact that a man and woman having openly cohabited as husband and wife for a considerable length of time, holding each other out and recognizing and treating each other as such by declarations, admissions or conduct, and are accordingly generally reputed to be such among their relatives and acquaintances, and those who come in contact with them, may give rise to a presumption that they had previously entered into an actual marriage, although there be no documentary evidence thereof or testimony to that effect; *and in the absence of evidence in rebuttal, the presumption may be conclusive of the fact of marriage,*" citing decisions of nearly every state of the Union. (Italics are mine, for there was no rebuttal evidence in this case at bar.)

In the same volume, and on page 831, the author says:

> "The North American Indians continuing their tribal relations, although within the territorial jurisdiction of a state, are not subject to its laws in respect to such matters as their domestic relations; and hence a marriage between Indians, valid by their laws and customs, is recognized as valid, although it would not have satisfied the requirements of the state law,"

citing many of the decisions I have herein set out in full, as authority for the text.

In Sec. 225 of Bishop on Marriage and Divorce, the author holds to the same doctrine as above presented as to these Indian marriages, and refers to this Missouri case of *Johnson* v. *Johnson.* There the writer says:

> "The Indian nations are in law foreign to our own, and there is a difference in law between allowing a foreign marriage to be valid, and according validity to a like marriage at home. We have treated with the Indian nations; and, since marriage is *jus gentium,* our court ought, if possible, so to press the legal principles governing their decisions as to hold to be good the marriage of those people with whom we maintain international relations. * * * If, practically, a man and a woman recognize each other as, *in substance* (to use an expression which, at least, can be understood), husband and wife, though they attempt to restrict the operation of the law upon their relation, public policy, the peace of the community, and the good order of society demand, that the law should hold them to be married

persons, bound by all the laws pertaining to marriage, unless some statute compels a contrary decision."

On this same feature, Judge Campbell spoke with great force and logic in his decision in the caes of *Kobogum et al.* v. *Jackson Iron Co.* 76 Mich., 498. Here the learned jurist says:

> "We have here marriages had between members of an Indian tribe in tribal relations, and unquestionably good by the Indian rules. The parties were not subject in those relations to the laws of Michigan, and there was no other law interfering with the full jurisdiction of the tribe over personal relations. We cannot interfere with the validity of such marriages without subjecting them to rules of law *which never bound them.* We think the complainants are lawful holders of Marji Gesick's interest, and that the decree should be affirmed."

Then we ask where is there any Creek statute or law prohibiting such a marriage among the Creeks by the usage and custom of said Nation? Defendants in error tried to set up a written statute of said Nation, but the reply of the plaintiff in error denied it emphatically and specifically. The defendants in error introduced no evidence whatever in the case, and that fact ends their allegations forever. They entered a demurrer to the evidence of plaintiff in error and thereby waived all controverted facts. So the record stands; and there it must remain. But suppose, for the sake

of argument, that we admit the statute as so alleged in their answer. Does that make any difference in the result of this case? Thomas, Barney Tiger, John Goat, Johnson E. Tiger and John A. Jacobs testified that, at the time of this marriage between Ben Porter and Jennie, this Creek custom of marriages was still in force—John Jacobs was emphatic about it. And when this feature was pressed upon him by counsel for defendants in error, and asked if those statutes did not do away with this custom, he answered "Not necessarily," as above shown in his testimony. Who denies this? No one; and there was not even an attempt to deny it. Then, again, that feature is conclusively ended by the testimony in this case. But suppose we would go still further, and ignore that testimony, what then? It would be the same still; for even where a state has laws prescribing how marriages may be consummated, but do not prohibit any other mode of marriage, those statutes are construed to be *directory* only—not *mandatory;* and a marriage may be consummated by a local custom or by common law, the same as if no such statute was ever passed.

On this subject, it is laid down in 26 Cyc, page 40, as follows:

> "Statutes requiring marriages to be solemnized in a particular manner, or before certain authorized persons, or under a license, although they may impose penalties for nonobservance, are generally construed as direc-

> tory only, in so far as this, that a marriage valid at the common law, but not celebrated in accordance with the requirements of the statute, will be held valid and binding, unless expressly declared void by the statute. But in several states the law is so framed that no valid marriage can be contracted except in the manner and with the formalities prescribed by the statutes."

citing a long list of decisions, among which is *Reaves* v. *Reaves*, 15 Ok. 240, which holds substantially as the text, and that an agreement to marry accompanied with cohabitation, living together and holding out to the world that they were man and wife, constituted a common law marriage, and valid.

It would look like if white people could get married that way, surely an Indian of the Creek Nation fifteen or eighteen years ago, ought not to be held up to a higher standard of certainty about such things than a white person, encircled with all that embellishes civilized life, and possessed for years and generations with every opportunity to advancement and a higher civilization. The court will not overlook that Jennie cannot even now speak or understand the English tongue, but had to be examined in this case through an interpreter.

To the same effect as Cyc is Sec. 66 of Rogers on Domestic Relations, where practically the same language is used, and goes still farther and

states that even where such statutes fix heavy penalties and the same are violated by marrying in a different way, the marriage is still valid, unless declared void by the statute. To the same effect is also Bishop on Marriage and Divorce, Sects. 283, 284, etc. And on this feature, let me call the court's attention to the case of *Meister* v. *Moore, The Keystone Bridge Company* and *Allegheny Cemetery et al.*, 96 U. S. 76, 24 Law Ed. 826, in which Justice Strong delivered the opinion. It is especially applicable to the case at bar, first, because it involves the marriage of an Indian girl and a white man, married without any ceremony whatever, and where they simply agreed to marry and thereafter lived and cohabited together as husband and wife, and had one child named Elizabeth; second, the State of Michigan, where the marriage took place, had a statute prescribing the manner of celebrating marriage. The marriage was in violation of the method prescribed by this statute, and on the trial, it was contended that the marriage was void, just as it is so contended in the case at bar, and was contended in the case of *Kalyton* v. *Kalyton*. But the Supreme Court of the United States in that case, the same as it did in the Kalyton case, held that the marriage was valid, even though it was not celebrated in accordance with the requirements of the statute.

In stating the case, the court said:

"Bernard L. Meister brought actions of ejectment in the court below, to recover certain real estate situate in and adjoining the City of Pittsburgh.

The defendants in each case appeared and entered a plea of not guilty.

The two cases were tried as one action before a jury. On the trial the plaintiff, to maintain the issue on his part, introduced evidence tending to prove that William Mowry went from Pittsburgh, in the State of Pennsylvania to the Saginaw valley, in the State of Michigan, some time in the year 1844 or 1845; that he there became acquainted with an Indian girl named Mary, the daughter of an Indian named Pero; that in the fall or early winter William Mowry and Pero's daughter Mary were married; that they lived and cohabited together thereafter as husband and wife, and had one child born to them named Elizabeth, who is still living; that William Mowry, during his lifetime, was the owner in fee simple of the lands described in the plaintiff's declaration; that he died intestate, some time in 1852, leaving no issue living at the time of his death except his said daughter Elizabeth, who afterwards married a certain man named Isaacs.

The questions involved upon the trial all grew out of and related to the fact and validity of the marriage between William Mowry and Mary, the daughter of Pero.

Meister was the alienee of the said Mary and Elizabeth, their husbands joining in the deed. The defendants held under deeds from the mother of William Mowry."

Point 1 of the syllabus of that case, is as follows:

> "In the absence of any positive statute, declaring that all marriages not celebrated in the manner therein prescribed shall be void, any marriage regularly made according to the common law, without observing the statute regulations, is a valid marriage."

Here we have two Indian marriages, the one arising in the State of Oregon, and consummated according to the usages and customs of the Indian tribe to which Joe Kalyton and his wife and child belonged, and upheld and confirmed by the Supreme Court of Oregon, and also that of the United States. The other celebrated according to the common law of Michigan, and upheld and confirmed by the Supreme Court of the United States over the decision of the Supreme Court of the State of Pennsylvania. In each case, the father died and left a little Indian girl and left property over which the relatives of the fathers contested the marriage of the fathers and attempted to bastardize their little girls, just as is attempted to be done in the case at bar, and was so attempted in the case of *Locust et al* v. *Caruthers et al.*, (Okla.) 100 Pac. 520, decided by the court on the 9th day of March, 1909—a little over two years ago; and *Bank of Austin* v. *Sharp*, 12 Tex. Civ. App. 223, and in each of all these cases the respective Supreme Courts, above referred to, upheld the

marriages and held the children legitimate, and entitled to the estate of their respective fathers, deceased in each case. Why not in the case at bar? The evidence in the case at bar is as strong as in any of the above cited cases, and much stronger than in the case of *Locust* v. *Caruthers*, wherein there was no evidence whatever, if my recollection serves me correctly, that a marriage was actually celebrated between the father and mother, but it did show that they had lived, resided and cohabited together for many years and had those children. The court there held that marriages would thus be presumed and held their children legitimate and gave them the property in the Choctaw Nation belonging to their father before his death.

Again, in each case above referred to, there was a full trial, in which each side introduced evidence and made a full defense; but still, the respective courts decided in favor of the validity of the marriage and legitimacy of the children, and gave them the property of their dead fathers. But, in the case at bar, the defendants in error saw fit to rest their chances simply on a demurrer to the evidence of the plaintiff in error, and by which they waived all conflicting evidence and admitted every fact alleged in the petition of the plaintiff in error, which is sustained by *the slightest degree of proof*, *Ziska* v. *Ziska*, 20 Ok. 634, and cases above cited. If on a demurrer to the evi-

dence, the court cannot weigh conflicting evidence, and cannot "disbelieve or disregard" the plaintiff's evidence, as shown in that Kansas case cited, but must take all facts as admitted which are proven in the slightest degree by the testimony of the plaintiff in error, then I am totally at a loss to know or understand how the defendants in error ever expect to sustain this degree, in the face of these numerous decisions and authorities above given. I am honestly of the opinion that no competent authority can be found on which to base such a defense, and that this decree should be reversed on these decisions and the law herein presented alone, without investigating any further authority governing this case, but I here insert the following quotation as a summary on that line:

Rogers on Domestic Relations in Sec. 67 to 73 inclusively, observes:

> *Sec. 67.* "So long as the Indians of North America maintain their tribal relations, they are distinct race or nationality of people, in a sense foreigners, and they are given the power to regulate their marriages and the forms and requirements thereof. Such matters are exclusively within the province of the laws, customs and regulations of the Indians themselves in their tribal relation and government. And these—not the state laws—must govern the validity or invalidity of marriages of the members of these tribes.
>
> *Sec. 68.* Generally speaking, under the customs in vogue among the Indians, there is

no ceremony of any particular kind required in order to create a valid marriage. No intervention of a civil officer or one of holy orders is necessary, and the publication of banns is unknown among them or their laws and customs in this respect. The marriage between the members of the Cherokee tribe, according to the usages and customs of which all that is necessary is for the parties to live together as man and wife, is valid everywhere. Nor is the extension of the jurisdiction of a state over the territory occupied by the Indians any barrier to contracts of this nature so long as the Indians themselves maintain their tribal relations. In harmony with this doctrine it is held that a marriage between members of an Indian tribe, though residing in one of the States, which was consummated by the husband sending a message to the parents of the girl, with presents which were accepted and the marriage agreed upon by all the parties, and in pursuance of which the girl left her parents and lived with her husband as his wife, being all that is required by the customs of the tribe, constitutes a good marriage. The residence of the Indian tribes within the boundaries of a state does not make them citizens of such state nor subject them to its laws in reference to their marriage customs or domestic government.

Sec. 69. While the federal congress has the power to enact laws regulating the actions of the Indians within the United States, the states themselves have no power to interfere with any of their customs or laws, and cannot in any way affect the validity of the marriage made in accordance with the laws and customs

of the Indian tribes, where such marriage is not with a citizen of the state, so long as the tribal relation between the Indians is kept up. Their marriages and other domestic laws and customs, so far as the Indians themselves are concerned, are binding on all the world when not in conflict with some act of congress or treaty with the federal government.

Sec. 70. When, by the laws of the Indian tribes, the husband may dissolve the marital relation at pleasure, the exercise of this option by the husband has the effect of completely sundering the marriage tie, as effectively as though done by a court of competent jurisdiction. This is a noticeable distinction in the law of marriage among the Indians when contrasted with that of the whites. Nor is this fact any ground for holding these marriages invalid. And such marriages are not contrary to the laws of nature because not permanently binding. It simply amounts to a material difference in the laws concerning marriages with the Indians and those governing the marriages of white persons—a thing of little or no concern to the Indians. The Indian husband, therefore, having the right under these laws to divorce himself at pleasure, it follows necessarily that he has, when he has thus divorced himself, the right to again marry, and in fact his marrying again is tantamount to a renunciation of the first marriage, and will be so treated in law.

Sec. 71. By the customs of these Indian tribes, which is frequently the case, the husband, contrary to the rule at common law, takes no part of the wife's property; nor is

she, by reason of the marriage, as at common law, shorn of any right to make contracts in any sense. She retains all her property, and may manage it regardless of her husband or his authority. This being true, it would necessarily follow that the Indian husband would take no estate by the curtesy in any of his wife's lands by virtue of the marriage.

Sec. 72. Ordinarily, where marriages among Indians have been contracted after the manner in vogue with these people, the relation of husband and wife is established, and this being true. the husband and wife, in the absence of an enabling statute, could not testify for or against each other. But in North Carolina, in the case of a marriage of members of the Cherokee tribe after their customs, it was held invalid because the Indians in question were, at the time of the alleged marriage, residents and citizens of the state. But even where the state law denies the validity of these marriages, it is only as to the citizens of the state, not as to the private domestic policy of the Indians. And this is the rule, though one of the parties to the marriage be a white person.

Sec. 73. The general rule is that the marriage of a white person with an Indian and a cohabitation in pursuance thereof in accordance with the customs of the Indians, with acknowledgment by the parties of each other as husband and wife, will be sufficient. And of course the offspring of a marriage thus consummated would be legitimate for all purposes. Nor is it necessary that such a marriage be celebrated within the bounds of

an Indian reservation or other lands allotted to the Indians, or that the parties after the marriage live upon such reservation or allotted lands. The white person thus marrying an Indian, and taking up his abode with them, becomes a part and parcel of the tribe, just as one renouncing his allegiance to one country adopts the habits, laws and customs of another and submits himself thereto."

From this line of decisions and authorities, applied to the testimony taken in this case, it would surely appear that Ben Porter and Jennie McGilbra complied with all the requirements found necessary, not only by the usages and customs of Creek citizens of the Creek Nation, respecting marriage among them, but also even the common law. Here the mother testifies in effect that Ben Porter, at the council meeting at Okmulgee, asked her to marry him. She instantly assented and agreed to this proposal of marriage and that day they commenced to live, reside and cohabit together as husband and wife by going to the home of his mother on that very day and slept together that night at his mother's home, and ever thereafter continued to live and cohabit together as husband and wife for a year and a half or longer, and during that time were reputed in the neighborhood to be married and thereby established the reputation in that community of being husband and wife, as shown by the testimony of Mary Grayson and other witnesses, whose testimony was taken in this case. This was a consummation of the mar-

riage *in praesenti*, followed by a continuous cohabitation from that moment for this length of time varying, according to the testimony, from one to two years, during which time Jennie McGilbra became pregnant and the plaintiff in error was born about three months after their separation, at the home of her mother at Eufaula, as shown by the testimony of William Sullivan. Ben Porter recognized and acknowledged the plaintiff in error as his child and Jennie McGilbra as his wife, and told different witnesses that Jennie was his wife and that the plaintiff in error was his child, as shown by the testimony in the record of this case. The testimony of Jennie McGilbra was taken in this case, in which she details all of these matters; and her testimony is corroborated in various ways by the statements of Robert Thomas, Mary Grayson, Bettie McIntosh, William Sullivan, Roley Alexander and others. The simple statement of John Lowe that he did not believe they were married amounts to nothing, especially when it is shown that at the time they were living together, as husband and wife, Lowe was in the State of Texas; nor did the joking remarks of Ben Porter to the old colored man, Robert Thomas, operate as a denial or contradiction of this marriage, but, on the contrary, confirmed the marriage, as shown by the testimony of Thomas. And, as this case was decided on the demurrer of the defendants in error to the testimony offered on behalf of the plaintiff in error, we respectfully submit that all

conflicting testimony, if there had been any, should have been disregarded by the court, and the court should have acted upon the affirmative testimony only, which, in our judgment, affirmatively showed a valid marriage between Ben Porter and Jennie McGilbra, according to the usages and customs of this Creek Tribe of Indians. If so, then according to these decisions and the authority cited in this brief, Ben Porter and Jennie McGilbra, were legally married, and the plaintiff in error being the offspring of that marriage, was the legitimate child of these parties and thereby became the legal and sole heir at law of her father, Ben Porter, and on his death, in November, 1906, she inherited the lands in controversy in this suit.

But, even if it should be considered that said marriage was not valid, or held that the plaintiff in error was not the legitimate child of Ben Porter, still, we respectfully submit that, under the Acts of Congress and section 1 of Perryman's and section 258 of McKellop's Constitution and Laws of the Muskogee Nation, heretofore cited and referred to under the first assignment of error herein, the plaintiff in error was the sole and only heir at law of her father, Ben Porter. The trial court found that the plaintiff in error "was the illegitimate child of this illicit relation" (page 71 of the record). This precludes any denial of that fact by the defendants in error. As hereinbefore shown, the plaintiff in error, in her petition and also in her amended petition,

claimed to be the sole and only heir at law of her father, Ben Porter, and as such claimed to have inherited from him the lands in controversy, and in said petition and amended petition specifically set up and charged that her father had acknowledged and recognized her as his child and offspring, as may be seen on page 21 in the original petition, and page 27 of said amended petition. As before stated, these specific allegations were not denied in the answer of the defendants in error; but even if they had been specifically denied, they were fully proven and established by the testimony of these various witnesses taken in this case. Then, as Ben Porter acknowledged and recognized the plaintiff in error, as his child and offspring, we respectfully submit that, under said Creek laws, section 1 of Perryman's and section 258 of McKellop's Constitution and Laws of the Muskogee Nation, the plaintiff in error, even though she had been illegitimate, thereby became the sole heir at law of her father and inherited the lands in controversy. These sections of this Creek law were construed by the Supreme Court of the Muskogee Nation on the 27th of November, 1889, in the case of *Bettie Frank* v. *David Frank*, in which said Supreme Court rendered its decision as follows:

> "*In the Supreme Court, Muskogee Nation. Nov. 27, '89. Bettie Frank* v. *David Frank.*
>
> This case comes here by appeal from the District Court of Deep Fork Dist.

It is a suit brought by the plaintiff to recover property accruing to her as the only child and heir of Thos. Frank, deceased, against David Frank, a brother of the deceased, who now has and holds the effects or estate of said Thomas Frank, deceased, by virtue of a decision of the said Dist. Court of Deep Fork Dist. rendered in his behalf.

The contention is as to whether or not the plaintiff in the case is the daughter of said Thos. Frank, deceased.

The evidence adduced although somewhat contradictory in part is sufficient to show to the court that the said Bettie Frank, the plaintiff in the case, was recognized by Thos. Frank, deceased, during his lifetime as his daughter, and such being the case the law governing such cases is clear.

It is therefore the opinion of the court and it so decides that the said Bettie Frank is the daughter and the legal heir of Thos. Frank, deceased, and as such is the proper owner of the estate of said Thos. Frank, deceased.

The decision of the Dist. Court is therefore reversed and the appeal sustained.

G. W. Stidham,
Chief Justice of Supreme Court, N. M.

Department of the Interior, Office of Superintendent for the Five Civilized Tribes, Muskogee, Oklahoma.

This is to certify that I am the officer having custody of the records pertaining to the enrollment of the members of the Choctaw, Chickasaw, Cherokee, Creek and Seminole Tribes of Indians, and the disposition of the land of said

tribes, and that the above and foregoing is a true and correct copy of decision of the Supreme Court of the Muskogee Nation in the Indian Territory, on pages 91 and 92 of the Minute Book of said court, in so far as the same pertains to case of *Bettie Frank* v. *David Frank*.

GABE E. PARKER,
Superintendent for the Five Civilized Tribes.
(Revenue Stamps.)

Feb. 24, 1915
C H D''

This decision may be found recorded on page 91 of the Supreme Court docket, a certified copy of which will be forwarded to the clerk of this court for the inspection of the court, if it sees proper. This is a decision of the Supreme Court of the Muskogee Nation itself; and construing and interpreting its own laws and statutes. Under the well established rule followed in the construction of laws and statutes of other states or nations, either adopted or coming before other courts for proper construction and interpretation, as shown by decisions hereinbefore cited, this judgment of the Supreme Court of said nation is binding on all other courts, *Robinson & Co.* v. *Belt*, 187 U. S. 41, 47 L. ed. 65, and *Adkins* v. *Arnold*, 59 L. ed. ..... This Creek law was passed by the Creek National Council and approved in October, 1881, and those statutes, as well as said section 310 were in force in said Creek Nation at the time this decision was rendered in November, 1889, see Perryman's Constitutional Laws of the Muskogee Nation, pages 81, 108 and 109; and, therefore,

said decision is applicable to the case at bar, where the father and mother of the plaintiff in error were married some four or five years after this decision.

These same Creek statutes have heretofore been before, and construed by, the Supreme Court of the State of Oklahoma, in the case of *Oklahoma Land Co. et al.* v. *Thomas et al.*, 34 Okla. 681, 127 Pac. 8, which involved practically the same matters, as the case at bar. In that case said Supreme Court went into a full consideration of these matters and of the various laws and decisions of various courts respecting Indian marriages and the result of laws pertaining thereto and rights and the status of children born of such marriages, citing a great many of the decisions set forth and referred to in this brief. In fact, in the rendition of that decision that court had before it this vital point in the case at bar, arising out of these Creek laws, and delivered a very full, able and learned opinion upon these matters and sustained said statutes, as may be seen by said decision, the syllabus of which is as follows:

> "1. *Indians — Domestic Affairs — Intercourse Between Sexes — Customs and Usages.* Prior to the dissolution of the tribal government of the Creek Nation, the United States Government expressly recognized the right of the Creek Indians to regulate their own domestic affairs, and to control the intercourse between the sexes by their own customs and usages.
>
> 2. *Marriage — Indians' Customs — Validity — Children — Legitimazation.* Marriages

by freedmen citizens of the Creek Nation residing therein, contracted according to the usages and customs of the tribe of which they became members, during the period that the tribal relations existed, and were recognized by the United States Government, will be considered valid in the courts of this state, and the children of such marriage will be regarded as legitimate.

3. *Same — Plural Marriages.* Plural marriages, if ever authorized by the customs and usages of the Creeks, were thereafter expressly prohibited and forbidden by the act of the Creek council, passed October 22, 1881.

4. *Same—Federal Statutes—Application.* Neither the Act of Congress of July 1, 1862 (chapter 126, 12 Stat. at L. 501), the amendatory Act of March 22, 1882 (chapter 47, 22 St. at L. 30 (U. S. Comp. St. 1901, p. 3633),), or the Act of March 3, 1887 (chapter 397, 24 St. at L. 635 (U. S. Comp. St. 1901, p. 3635),), in relation to polygamy and unlawful cohabitation, was ever in force in the Creek Nation in the Indian Territory, among the members of said tribe, who intermarried according to the tribal usages and customs, and while the tribal relations were maintained and recognized by the United States Government.

5. *Indians — Property — Descent—Creek Indians.* Section 1 of article 2 of chapter 12 of the Laws of the Muskogee (Creek) Nation, and section 258 of chapter 14 of the Laws of said nation, as compiled and codified by A. P. McKellop, under Act of October 15, 1892, confer upon an illegitimate child the right to share in the estate of the putative father who had recognized such child as his own, and did not give

to the brothers and sisters of the half blood of such legitimated child the right to share in its estate with a sister of the whole blood; the father having died prior to the death of such child.

6. *Same—Inheritance From Father.* Said acts of the Creek council do not render such child capable of inheriting as the legal representative of such father, but only legitimatizes it as respects the father.

7. *Indians—Usages and Customs—Evidence.* Testimony tending to prove the laws, usages, and customs of the Creek Nation, with regard to the marriage relation and the legitimacy of the children of such marriages and their consequent legal status as heirs, during the period in question, *held,* competent, and that it was error to exclude such testimony, if otherwise competent."

In the body of the opinion in this case, after referring to said section 258 and setting out said section 1 of said Creek laws, above referred to, the court observed:

"There was testimony introduced showing that Dixon Scott in his lifetime had recognized Ellen and Lurcetia as his offspring. The effect however, of this recognition does not appear to legitimatize such offspring generally, and to confer upon them all the legal rights of legitimate children; but, on the other hand, the obvious purpose of the statute was to enable bastard children, recognized by the father as his offspring, to share in his estate upon his demise, thus limiting the effect of such legitima-

tion to lineals, and that as to collaterals the taint of bastardy should still inhere.

The Creek council, in the exercise of its lawful function of local self-government, saw fit to limit the legal rights of an illegitimate child to that of sharing in the estate of his putative father, and not to confer upon such child generally the status of a child born in lawful wedlock."

This feature was further discussed in that opinion holding that such bastard children could inherit the estate of their putative father; but the above quotation is sufficient to show that by the construction of the Supreme Court of Oklahoma of said section 258 and section 1 of said Creek laws, a bastard child, recognized by the putative father in his lifetime, thereby became his heir at law and entitled to inherit his estate. Here we have a decision of the Supreme Court of the Muskogee Nation itself and likewise the Supreme Court of the State of Oklahoma, holding that, under and by reason of these respective sections and provisions of this Creek law, a bastard child became the heir at law of its putative father and inherited his estate at the time of his death, if, during his lifetime, he recognized and acknowledged such child as his offspring. Yet, in the case at bar the plaintiff in error while being held to be the illegitimate child of Ben Porter, is denied her right to inherit the estate of her deceased father, in the very face of the fact that it was pleaded by her in her original and supplemental petitions that

she was the child of said Ben Porter and Jennie McGilbra and that her said father had repeatedly recognized and acknowledged her as his child and offspring, during his lifetime. Not only is this fact pleaded by the plaintiff in error, but the same is not denied by the defendants in error in their answer, except they set up, in effect, that Ben Porter was not her father. But the court found that Ben Porter was the father of the plaintiff in error and the evidence taken in this case abundantly shows that Ben Porter recognized and acknowledged the plaintiff in error as his child and offspring, and the same is nowhere denied or disputed by any testimony in the case. It is true, that the trial court and Supreme Court do not pass directly on this feature of the case in the decree or opinion of the Supreme Court. But these matters were before the court on these pleadings, and were insisted upon by the plaintiff in error in this case. The fact that these courts make no mention of this particular feature, is no fault of the plaintiff in error. The court necessarily had to pass upon the same, whether it mentioned them or not, in reaching the conclusion that the plaintiff in error was not entitled to the lands in controversy. Otherwise, it could never have reached that conclusion upon the issues presented in the pleadings in this case; and, having held that the plaintiff in error was not in any event entitled to these lands, said decision resulted in depriving her of the lands of her father, to which we

maintain she was justly entitled under chapter 49 of Arkansas, in force in the Indian Territory at the time of the death of her father, in November, 1906, which chapter was thus put in force by an act of congress. In other words, it is the contention of the plaintiff in error, that she was the legitimate child and offspring of Ben Porter and Jennie McGilbra, whose marriage, under the usages and customs of the Creek Tribe of Indians, was valid, and that she is legitimate and therefore, the sole and only heir to the estate of her father, under said acts of Congress in force in Indian Territory at the time of the death of her father; and that, this decision depriving her of said estate is in violation of said acts, and deprives her of her rightful inheritance to the estate of her father in violation of said act. It is further contended by the plaintiff in error that even though she was the illegitimate child of her putative father, Ben Porter, she became his heir at law under said Creek laws herein cited, by being acknowledged and recognized by her father during his lifetime as his child and offspring; and having thus under said laws of the Creek Nation of which she and her said father and mother were members, she ever thereafter remained his sole heir and entitled to inherit the estate at the time of his death. In other words, she having thus become his heir at law by this recognition, she inherited his allotment at the time of his death, even under chapter 49 of Arkansas, as the same existed at the time of his death;

and being thus entitled to said allotment, and having thus inherited the same under said acts of Congress, this court has jurisdiction to pass upon these matters and determine her rights in and to said allotment of which she was thus deprived by the decision of the state courts in this case.

We further contend that when the defendants in error demurred to the testimony of the plaintiff in error, they were bound by the law that governs courts in passing upon a demurrer to evidence; and that, a demurrer to the evidence raises an issue of law to be determined from the facts established by the proof in the case, according to the law governing a demurrer to the evidence; and that it is not in the power of a court, by ignoring that law which governs them in passing upon a demurrer to evidence to change the issue of law thus raised by demurrer to the evidence into an issue of fact, and thereby decide the case against the demurree when if the law was followed, which governs demurrer to evidence the decision would necessarily have to be in favor of the demurree and against the demurrant. And we further contend that where the court attempts to waive conflicting testimony, etc., on a demurrer to testimony, where the testimony reasonably sustained the rights of the demurree, that act of the court is in violation of the 14th Amendment to the Constitution of the United States, and denies to the demurree the equal protection of the law, as provided in said amendment. It may be claimed

by the defendants in error that the case at bar presents simply a matter of state practice; and, therefore, this court has no jurisdiction in such matters, which, is generally true. But, in the case at bar, we maintain that this case does not involve a matter of state practice, *first*, because of the numerous acts of Congress involved in the case and the right to said allotment, hereinbefore pointed out; *second*, because the decision in this case was not in accord with all prior decisions, on a demurrer to evidence, of the Supreme Court of Oklahoma, or of its predecessors, the Supreme Court of Oklahoma Territory and of Kansas, from which latter state our practice act was taken, as heretofore shown; *third*, because said decision is not in accord with said practice act itself and especially section 5039 thereof, which specifically relates to trials to the court and which provide that trials to the court shall be the same as that of trials to a jury, as far as possible, as shown by said section; and, *fourth*, because said decision thus holding that on a demurrer to evidence the court could waive conflicting testimony, etc., and render judgment accordingly, did not operate as a change or subversion of the practice under said statute in the State of Oklahoma, and thus laid down an entirely different rule in said state thereafter even where there was a demurrer to evidence in a case tried to the court, as the Supreme Court of the State of Oklahoma followed the same rule, after this decision, as it had followed

prior thereto, in cases tried both to the court and to a jury, as may be seen by the cases following. It will be noticed in the case at bar, 39 Okla. 500, that this opinion was filed on the 21st of October, 1913. Yet, in the case of *Morris* v. *Hunt*, 135 Pac. 282, decided on the 9th of September, 1913, the Supreme Court of Oklahoma, in a case tried to the court, held:

> "Upon a demurrer to the evidence, the weight of conflicting evidence cannot be weighed, and for this reason we think the trial court committed error in sustaining the demurrer to the evidence, and the judgment of the trial court is reversed, and the cause remanded for further proceedings in accordance with this opinion. All the justices concur."

And in the case of *Midland Valley R. Co.* v. *Larson*, 138 Pac. 173, Point 3, decided on January 19th, 1914, only three months after the decision in the case at bar, the Supreme Court of Oklahoma held:

> "3. *Carriers* (§230*) — *Trial* (§156*)— *Demurrer to Evidence—Damages to Shipment.* A demurrer to the evidence admits every fact which the testimony, together with such inferences as may reasonably arise from the surrounding circumstances, reasonably tend to prove; and, in an action for damages where the testimony, considered in the light of the surrounding circumstances, reasonably tends to show that plaintiff sustained the amount of damages claimed, and that defendant had unlawfully caused such damages, a demurrer to the evidence is properly overruled."

And in *Crow* v. *Crow*, 139 Pac. 122, decided on the 13th of January, 1914, also about three months subsequent to the decision in the case at bar, the Supreme Court of Oklahoma again held:

> "*1.* A demurrer to the evidence admits all facts proven, admits the existence of the facts of which there is evidence tending to prove, and all the reasonable inferences which may be drawn from the evidence. The question on demurrer is: Does the evidence, considering only that which is favorable to the demurree and yielding to him the full benefit of the reasonable inferences which it supplies and furnishes, entitle him to recover?"

And in the body of the opinion delivered in that case by Justice KANE, it is observed:

> "There was considerably more testimony to the same effect, all tending to show bad faith on the part of the defendant herein and a disposition to deceive, not only the plaintiff, but the courts in which the various divorce proceedings were pending. We think it was error to sustain a demurrer to this evidence. The rule is that a demurrer to the evidence admits all facts proven, admits the existence of the facts of which there is evidence tending to prove, and all the reasonable inferences which may be drawn from the evidence. The question on demurrer is: Does the evidence, considering only that which is favorable to the demurree and yielding to him the full benefit of the reasonable inferences, which it supplies and furnishes, entitle him to recover? *Jaffary et al.*, v. *Wolf et al.*, 4 Okla. 311, 47 Pac. 496; *Edmis-*

son v. *Drum-Flato Commission Co.*, 13 Okl. 440, 73 Pac. 958; *Conklin* v. *Yates et al.*, 16 Okl. 266, 83 Pac. 910; *Ziska* v. *Ziska et al.*, 20 Okl. 634, 95 Pac. 254, 23 L. R. A. (N. S.) 1; *Shawnee Light & Power Co.* v. *Sears*, 21 Okl. 13, 95 Pac. 449.

In a later case it was held that, where the evidence is conflicting and the court is asked or on its own motion considers the direction of a verdict, all facts and inferences in conflict with the evidence against which the action is to be taken must be eliminated entirely from consideration, and totally disregarded, leaving solely the evidence for consideration which is favorable to the party against whom such action is leveled. *Cooper* v. *Flesner et al.*, 24 Okl. 47, 103 Pac. 1016, 23 L. R. A. (N. S.) 1180, 20 Ann. Cas. 29.

We think, therefore, that the demurrer to the evidence ought to be overruled, and that the court should proceed with a trial of the cause wherein defendant may introduce evidence; and, if he offer none, the weight and sufficiency of that introduced by the plaintiff must be weighed by the court, and a judgment rendered thereon which involves the determination of a question of fact. All the justices concur."

This decision would seem to be the very reverse of the decision in the case at bar and rendered three months subsequent thereto. Here, instead of the court in a case tried to it stopping to weigh conflicting testimony on the interposition of a demurrer to evidence, and then rendering judgment on the merits, as was done in the case at bar,

this decision marks out the procedure in such cases indicating that such demurrer to the evidence should be overruled, and the defendant given an opportunity to introduce his evidence; and if he introduces none, then to decide the case, according to the evidence before the court. This court will also observe that this *Crow* case was a suit in chancery relative to some divorce proceedings and, of course, was tried to the court, the same as the case at bar. Yet, instead of adhering to the decision in the case at bar, the Supreme Court still followed the old rule governing a demurrer to evidence and cited several of these prior decisions referred to in this brief, which had long established the practice in the state on demurrers to evidence.

Again in the case of *Cameron & Co.* v. *Henderson,* 140 Pac. 404, rendered on the 14th of April, 1914, the Supreme Court of Oklahoma again held:

> "Where the evidence is sufficient to reasonably tend to support the allegations of a petition that states a cause of action, a demurrer to such evidence should be overruled.
>
> 2. *Trial* (§156*)—*Demurrer to Evidence —Effect as Admission.*
>
> It is a settled rule that a demurrer to the evidence admits all the facts which the evidence in the slightest degree tends to prove, and all inferences or conclusions that may be reasonably and logically drawn from the evidence."

This court will also observe that three of these last cases cited were rendered by the Supreme Court

itself, *whereas,* the case at bar was rendered by one division of the commission to that court; and that, the decision in the case at bar has not been followed by the Supreme Court of Oklahoma since its rendition nor was it the law before its rendition, relative to demurrers to evidence. So it would seem that with the exception of the case at bar the uniform practice in the State of Oklahoma both prior to its admission as a state into the Union and since its admission, on a demurrer to the evidence that the settled rule has been as indicated in these last decisions and those prior thereto cited in this brief. So that it cannot be said that the case at bar settles the rule of practice or is a diversion of the former settled rule of practice, in such matters. Hence, we respectfully submit that the action of the court in sustaining this demurrer to the evidence and rendering judgment against the plaintiff in error in the case at bar, is neither due process of law, as guaranteed by the 14th Amendment to the Constitution of the United States; nor does the same afford to the plaintiff in error the equal protection of the laws as also guaranteed in said amendment; but that said decision is contrary to said amendment and denies to the plaintiff in error her right, title and interest in the lands in controversy, not only contrary to, and in violation of, said amendment but likewise said acts of Congress, which govern the final disposition and inheritance of said lands, as hereinbefore cited and set forth.

Fourth Assignment of Error.

That said court erred in holding that the plaintiff in error, even if she had been illegitimate, was not entitled to said lands; for it is found in said judgment that "the plaintiff, Nellie Porter, was the illegitimate child of this illicit relation." If so, under the said Acts of Congress mentioned in the first assignment, the plaintiff in error would have been the sole and only heir to the lands in controversy, for it so found that she is the "illegitimate child of this illicit relation," and, therefore the child of Ben Porter.

Again, section 258 of McKellop's "Constitution and Laws of the Muskogee Nation," provides: "If any person claim to be the child of a deceased male person, and it should be proven that such person did not, during life, recognize the claimant as his offspring, then such claimant shall not be entitled to any share in the estate of the deceased;" this was a part of the laws of descent of said Creek Nation and was in force at the time of this marriage and the birth of the plaintiff in error, and this feature is set out in both the original and amended petitions of the plaintiff in error, and therefore brought directly to the notice and attention of the court, and is still before the courts. This allegation was nowhere denied by the answers of the defendants in error, and now stands there uncontradicted. Besides, the proof on this point, namely, that Ben Porter recognized the

plaintiff in error as his offspring, was abundantly proven by the testimony in the case. The judgment, therefore, is in direct violation of this law and the evidence on the matter, and denies the plaintiff in error her right and title to said lands, which, under said laws, she would otherwise have been entitled to had said court recognized and enforced said laws in this assignment mentioned.

Fifth Assignment of Error.

That said Ben Porter and the plaintiff in error are full-blood Creek citizens and were so enrolled; that the lands in controversy was the allotment of said Ben Porter under said Act of Congress entitled, "An Act to ratify and confirm an agreement with the Muskogee or Creek Tribe of Indians, and for other purposes," or another Act of Congress entitled, "An act to ratify and confirm a supplemental agreement with the Creek Tribe of Indians, and for other purposes;" that when said Ben Porter died in November, 1906, said lands descended to his heirs under said last named act, and especially section 6 thereof; that under said Acts of Congress herein mentioned, and the laws and customs and usages of said Creek Nation, the plaintiff in error was, and still is, the rightful and legal heir of said Ben Porter, and entitled to said lands thereunder; that said judgment of said court was against said Acts of Congress and said laws, usages and customs of said Creek Nation,

and thereby denied to the plaintiff in error her right, title and interest in and to the lands in controversy in this suit, contrary to the terms and provisions of said laws aforesaid.

These two assignments of error are, in fact, embraced in the second and third assignments; and we have already presented under those assignments the law and matters, which would otherwise properly come under these assignments. So that, it would serve no useful purpose to again go over the same premises under these two last assignments; but we will kindly ask the court to consider them under the authority heretofore cited and discussed under the other assignments.

For the reasons herein assigned, we respectfully submit that said decisions of said courts of Oklahoma are erroneous, and that the same should be reversed and remanded to said courts with the instructions to enter up a judgment in favor of the plaintiff in error and against the defendants in error, together with her proper costs herein expended.

Respectfully submitted,

LEWIS C. LAWSON,
Counsel for Plaintiff in Error.

FRANK L. MONTGOMERY,
U. S. Probate Attorney.